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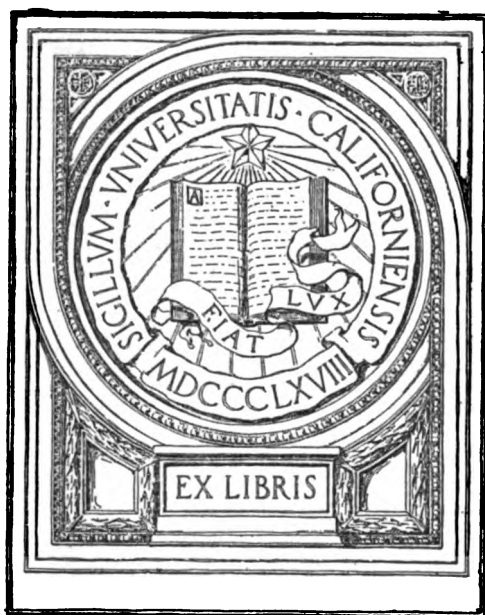
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DECISIONS
OF THE
Court of Common Pleas, Philadelphia,
CONTAINED IN THE
LEGAL INTELLIGENCER, VOLS. 30, 31.

Court of Common Pleas, Philadelphia.

[Leg. Int., Vol. 30, p. 36.]

BRINCKLE vs. BRINCKLE.

A libel in divorce should state that there was an actual marriage, not a mere agreement to marry.

Demurrer.

Opinion delivered *January 25, 1873*, by

LUDLOW, J.—Leave was granted to the libellant in this case, to amend her libel, by setting forth in explicit terms, that a marriage had been contracted and celebrated between the respondent and herself.

The attempt has now been made to comply with the order of the court, but the majority of this tribunal do not think that the order made has been complied with.

It is true, the libellant declares, that in the month of January, 1857, she became the lawful wife of J. Gordon Brinckle, but she goes on to say, that "a contract of marriage was made between your libellant and the said J. Gordon Brinckle, whereby your libellant agreed to become then and there his lawful wife, and the said J. Gordon Brinckle agreed to become, then and there, her lawful husband."

Was this contract executed or executory merely? If only executory, then the contract is simply an agreement to marry, and not a marriage. The language used in this amended libel clearly raises a doubt upon the point named, for while one construction might possibly indicate the existence of an executed contract, the other as clearly implies a mere promise, and this idea is strengthened by the fact, that no precise time is specified, but only the month of January.

Our difficulty is, to understand why the usual form is not adopted in this case; if the facts to be proved by libellant, and which must be presumed to be within the knowledge of libellant and her counsel, will establish a marriage, according to the law of Pennsylvania, why cannot the libellant conscientiously declare that she was married? Why

embarrass the case by allegations which throw doubt upon the question, or at least, qualify the main proposition sought to be established?

Judge Peirce thinks this amendment is within the order of the court, but the other judges do not agree with him, and believe that no useful purpose will be accomplished by permitting a departure from our usual form, especially when it is easy to understand, how a door would be open to suits for divorce, in which nothing could be established but the existence of an executory agreement.

Demurrer sustained, with leave to amend.

James L. Ferriere, Esq., for plaintiff.

Hon. F. Carroll Brewster, for defendant.

[Leg. Int., Vol. 30, p. 44.]

In the matter of the Petition of the CREDIT MOBILIER OF AMERICA,
for Decree of Dissolution.

1. The act of 1856, in relation to dissolving corporations, applies to such as are directly incorporated by the legislature.
2. This court will not make an order for the dissolution of a corporation, if it would prejudice the public welfare or the interest of the corporators.

Opinion delivered *February 1, 1873*, by

ALLISON, P. J.—The petitioners are a corporation chartered by the Legislature of Pennsylvania, in 1859, under the name of the "Pennsylvania Fiscal Agency," and by the act of March 26, 1864, the name of the corporation was changed to that of the "Credit Mobilier of America."

The petition is based upon the act of April 9, 1856, P. L. 293, which declares that it may be lawful for the Court of Common Pleas of the proper county to hear the petition of any corporation praying for permission to surrender any power contained in its charter or for the dissolution of such corporation; and if such court are satisfied that the prayer of such petition may be granted without prejudice to the public welfare or the interests of the corporators, the prayer of such petition may be granted. The restrictions on the exercise of this power are, that such surrender shall not remove any limitation or restriction contained in the charter; that the accounts of the managers, directors or trustees of any dissolved company shall be settled in and approved by the court, and dividends of the effects shall be made among any of the corporators entitled thereto, as in the case of the accounts of assignees and trustees.

The petition asserts, that from a date anterior to July 6, 1868, the corporation has transacted no business except to collect assets and pay previous liabilities and expenses incident to litigation, and that it has no other functions than these to perform, except to distribute among creditors, if any there be, and divide surplus among persons entitled to the same. That by reason of pending suits against the corporation, they are prevented from winding up, and making distribution of assets.

The reasons assigned in support of the application are, the inconvenience and expense of maintaining the organization, and taxation imposed on their unemployed capital.

At an adjourned meeting of the corporators, held June 12, 1872, at which 22,900 shares of stock were represented, a vote was passed

authorizing the present application; Henry S. McComb, alone, by his attorneys, protesting against the action of the meeting. A resolution was at the same time passed requesting the directors to vest the property and assets of the company in trustees, in the event of a dissolution being obtained, *in trust*, to pay all claims on the corporation, and distribute the assets among persons entitled to the same.

This instruction was carried into effect by a conditional conveyance of all the property of the corporation to three trustees, citizens of the city of Boston, Massachusetts, in trust, for the objects set forth in the resolutions of July 12, 1872.

The case is before us at this time on exceptions filed by Henry S. McComb, to the report of the master, to whom the petition was referred. The report recommends that the prayer of the petitioners be granted.

It is made a ground of objection, that the act of April 9, 1856, does not apply to corporations chartered by the Legislature; that the true intent and meaning of the act is, that no other corporations except such as are created by decree of the Court of Common Pleas can avail themselves of its provisions. If we felt at liberty to regard this as an open question, there is much in this suggestion worthy of serious consideration. It might be proper for us to look at the title of the act, as needed to let light in upon that which may be regarded as obscure without; it is called a supplement to the acts relating to incorporation by the Courts of Common Pleas, and the context of the act would seem to point to corporations created by the Common Pleas. It is the Common Pleas of the "proper county" which is authorized to entertain jurisdiction of the application, and it needed subsequent legislation to explain the true meaning of the term "proper county." A legislative interpretation was given to it by the act of April 4, 1872, which provides that the "proper county" intended by the act of April 9, 1856, may be either the county in which the principal operations of the corporation are conducted, or the county in which its principal office or place of business is located. But it may be a question of no little difficulty in some cases to settle even this point, as where a corporation, like a railroad or canal company, may extend from one border of the Commonwealth to the other, having extensive operations and places of business in several counties. There are other considerations which it might be proper to refer to in this connection, if we did not regard the question as settled against the exceptant by the case of the *Commonwealth vs. Slifer*, 3 P. F. Sm. 71, which holds that the act of 1856 does not restrict the power of Courts of Common Pleas to dissolve corporations to any class of corporations, whether chartered by the Legislature, or by courts, or by letters patent granted by the Governor under the act of July 18, 1863, relating to the incorporation of mechanical, manufacturing, mining, and quarrying companies. This decision we regard as the conclusion of all controversy upon this point; nor do we agree with the argument made by the exceptant, that we ought to consider as extra judicial all that is contained in the opinion of the court, giving to the act an interpretation broad enough to embrace companies chartered by the Legislature, because not necessary to the decision of the question then before the court. But the point was doubtless made in resisting the application for a mandamus to compel the Secretary of the Commonwealth to file in his office a decree of the Court

of Common Pleas, dissolving a corporation holding letters patent from the Governor, under the act of July 8, 1863. To the broad question the court addressed itself in the decision of the cause, which stands to us as *res adjudicata*, behind which we cannot go; we, therefore, pass by, without further remark, the very able argument made by the counsel for the exceptant, against giving to the act under which the petition is filed a construction which takes in corporations whose authority is derived by direct grant from the Legislature. Starting with this as a point established against the exceptant, is the way clear on all other grounds for a decree of dissolution and surrender of corporate power?

It is not unworthy of remark just here, that the master has not found as a fact that which is necessary to give jurisdiction to this court. No one could have decided before the act of April 4, 1872, the "proper county" in which to make the application for dissolution; this is determined by the fact of location of the principal office or place of business, or the county in which the business of the corporation is chiefly conducted. Before a petition for dissolution can be entertained, one of the other of these facts ought to appear *prima facie*, at least, and before a decree in accordance with the prayer of the petitioner can be entered, such fact must be shown to the satisfaction of the court.

This does not appear to have been done, perhaps because it could not have been established. In the charge of Judge Pearson, reported in 17 P. F. S. 259, in the case of the *Credit Mobilier vs. The Commonwealth*, I find this statement:—"The corporation was created by the Legislature of Pennsylvania, and was required to keep an office in the State, which was done in point of form merely, as all of its business was transacted in the cities of New York and Boston, where the stockholders mainly resided."

Assuming this to be true, the petitioners are not entitled to make application in the Court of Common Pleas of either of the counties of this Commonwealth; if its principal offices and places of business are in other States, then it is not in a position to avail itself of the benefits of the act under which the petition is filed, for the act of 1872 clearly contemplates the location of the principal office or the transaction of the chief part of its business in one or the other of the counties of Pennsylvania, as determining the "proper county" in which to make application under the act of 1856.

It is further objected against the right of the petitioner to the decree of dissolution that the act does not contemplate the case of a corporation whose affairs are unsettled, and against which suits are pending and undetermined. It is confessed in the petition filed that suits have been instituted against the *Credit Mobilier*, which places them in the position of not being able to wind up the affairs of the corporation, by a division of corporate property among stockholders and creditors whose claims are not denied. The act does not, in terms, provide for the ascertainment or payment of debts due to creditors.

The court must see that the public welfare and the interests of corporators suffer no prejudice, and this would seem to look to the dissolution of a corporation when its affairs were settled up, so that nothing remained to be done but to divide the effects among corporators who are the members of the corporation or stockholders of the body. The

omission of the act to provide in terms for the ascertainment of the claims of creditors and distribution among them, favors this view, and unless such power can be drawn from the latter clause of the sentence referring to the settlement of the accounts of the corporation, it does not exist. It says, the accounts shall be settled and approved by the court, and dividends of the effects made among corporators, as in the case of the accounts of assignees and trustees. The master is of the opinion that creditors may maintain their claims on settlement of the accounts, as contemplated by the act. He asks, may not the companies' liabilities be ascertained by this court, upon the settlement of the accounts of the trustees, and will not this satisfy any creditor, and fully meet the substantial requirements of justice?

No stronger reasons can be urged against this interpretation of the act because of the magnitude of the interests which by this process might be brought into liquidation than could be made against the settlement of the affairs of a bank, or railroad, or other corporation which should make an assignment for the benefit of creditors, involving property of the value of millions of dollars, and the adjustment and payment of claims of equal magnitude.

But with this much conceded, we are not prepared, at this stage of the proceeding, to decide that such is the correct interpretation of the act, and to give a binding construction to it now; this can be better done when the question arises, if it ever should, upon the report of an auditor making distribution upon settlement of the accounts of the directors of the corporation, as preliminary to a decree of dissolution. Upon one point we are very clear in our opinion, that is, that no such decree should be made in any case until the court are able to make distribution among the corporators of that which remains after the payment of creditors, so that we can with certainty carry out the injunction of the act, and see to it that the decree works no prejudice to the interests of the corporators, and at the same time guards the just interests of those whose rights stand upon an equity prior to that of the stockholders.

Such has been the practice of this court in all cases which have been brought before us under the act upon which the petitioners ground their application. The instances have not been frequent, but several have arisen, and been acted on, where incorporated engine or hose companies have gone out of service since the paid fire department of the city has taken the place of the old organization. The exceptant, Henry S. McComb, is not merely a creditor by demand, made to the officers of the corporation, for payment of his claim, but in 1868 he brought suit in the Supreme Court of Pennsylvania, in equity, against the Credit Mobilier, in its corporate capacity, and Sidney Dillon *et al.*, claiming that he is the owner of between three and four hundred shares of the stock of the company, together with all the dividends and profits accrued thereon since 1866. He seeks in this proceeding in equity to recover the value of 375 shares of stock, at \$500 per share, and profits amounting to \$280,000, which he claims had accrued thereon up to the date of the filing of his bill. This suit is still pending and undetermined. It is not doubtful what the effect of a decree of dissolution would have upon this claim if the exceptant was seeking to enforce its payment

by suit at law. It is certainly true that *at law* debts due to and from a corporation are totally extinguished upon dissolution, so that neither can they be recovered by it nor charged against it, and both at law and in equity all pending suits by or against thereby abate. Angell & Ames, § 779.

Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the Legislature, it becomes defunct and the suit abates, unless the Legislature save the right of action against the corporation; *Greeley vs. Smith*, 3 Story, 657. And this must be equally true where the Legislature, without saving the rights of suitors, give to the courts the power to accept a surrender of corporate authority, and decree the death of the body. To the same effect is *Merrill vs. The Bank*, 31 Maine Reports, 57; *May vs. State Bank*, 9 Robinson, 56.

This is conceded by the master, who reported in favor of a dissolution, and says a technical abatement of a suit at law against the Credit Mobilier would be worked by a decree of dissolution, whilst the rights of a creditor remain in equity unaffected, as against the assets of a dissolved corporation. It is difficult to see how a suit at law can be maintained after the death of the defendant, who can make no testamentary disposition, appoint no executor, and upon whose estate no administration can be raised.

The master, however, holds that as the assets of the corporation in the hands of the trustees are held subject to any claim that may be established against them by creditors, the protection is ample. The question is asked, without being answered, may not the trustees be made parties defendant to the suit in the Supreme Court? This may be so, and yet there is room to doubt whether the suit against the corporation now pending would not abate, and the creditor be turned over to a new proceeding against the trustees.

The equity of the creditor to obtain satisfaction of his debt out of the assets of a dissolved corporation is now well established: in support of this doctrine the master cites 7 Peters, 281; 15th Howard, 304; 8 Georgia, 493; 10 Paige, 541.

He also cites from Chancellor Kent, who states the doctrine thus:—The rule of the common law has in fact become obsolete; it has never been applied to dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and by judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders; and a court of equity will lay hold of the fund and see that it be duly collected and applied.

But whether the present suit in equity can be maintained by calling in the trustees as parties defendant, after the death of the corporation, or whether a new proceeding would have to be instituted, we should pause before we make a decree that might impose on suitors against the Credit Mobilier great risk and inconvenience in the prosecution of their claims against the company. We are not to shut our eyes to the fact that all three of the trustees are citizens of the State of Massachusetts, and not therefore within reach of the process of the courts of Pennsylvania, and that a decree such as is prayed for would, to a great extent, if not wholly, deprive the exceptant and other suitors in equity from obtaining such

further discovery as they may be entitled to have in the maintenance of their demands. If dead in law, the corporation could make through its proper officers no further answer to inquiries that might be important, if not essential, to more full and perfect discovery in equity.

The master, as we have seen, asserts the general doctrine that equity will carry the effects of a dissolved moneyed corporation over to the trustees for the use and in trust for creditors. But the rights of creditors, under the act of 1856, to make claim upon the funds of the corporation in the hands of the trustees, upon accounts settled under the act, which in direct terms makes no provision for creditors, is not entirely free from doubt; the question should be settled before we enter the decree prayed for. Nor is it satisfactorily shown that the pending suit in equity would not fall dead the moment such a decree was made; nor in what way the trustees, if the suit survives, can be made parties to it, if they elect to keep beyond the jurisdiction of the court. A decree ought not to be made that would subject suitors to either one or the other of these risks, which would impose great inconvenience if suits had to be again brought, and might result in entire loss of remedy before the tribunals in which they have chosen to litigate their claims. To do that which we are asked to do in advance of the settlement of the accounts of the corporation would be to bar, in some degree, the way of justice, and impair, if we did not destroy, the remedy which the law of the land now gives to those having claims against the body.

But there is another reason why we should at least pause and at this time refuse the petitioners the death for which they pray. The law says that the court must be satisfied before entering a decree of corporate dissolution that it may be done without prejudice to public welfare. In view of recent developments, which reach us as a part of the history of the government, making inquisition into the past transaction and present standing of the Credit Mobilier of America, can any one affirm, that the dissolution of this corporation would be without prejudice to the interests of the public?

The government has given notice that it claims to be a creditor of the corporation to a large amount. Congress has by its action directed the employment of counsel to investigate and prosecute such claims. Shall we embarrass the possible future action dependent on such an inquiry, by taking from the body its very existence, and enable it to pass out of sight, by quietly descending into a grave, which by anticipation it has prepared for itself, and turn the government as well as individual creditors over to a scramble for the effects of the body?

This corporation should be compelled to continue to live and stand in its proper place until the way be made clear beyond reasonable doubt, that without prejudice to public welfare or the interests of corporators, and we may add that of creditors, we may safely give to it the death which it desires to die by our hands.

The exceptions to the report of the master are sustained, and the prayer of the petitioners is refused.

R. C. McMurtrie, Esq., for petitioners.

Thomas Hart, Jr., Samuel G. Thompson, and James E. Gowen, Esqs., for exceptant.

[Leg. Int., Vol. 30, p. 52.]

PARKER vs. SPILLIN.

Preliminary injunction will not be continued where plaintiff has slept upon her rights for years.

In equity. Opinion delivered *February 8, 1873*, by

PAKSON, J.—Whatever merits this case may develop upon final hearing, it is not now in a position to entitle the plaintiff to a continuance of this special injunction. The equities of the bill are flatly denied in the answer of the defendant, and but feebly sustained in the supplemental affidavits filed in behalf of the plaintiff. In addition to this the claim is stale. It is nearly ten years since the plaintiff executed and delivered the deed which she now seeks to set aside. While this lapse of time is not a bar in equity, it is nevertheless to be considered upon the question of granting the special relief prayed for. The plaintiff having slept upon her rights for so many years, may well await the ordinary course of equity proceedings. The extraordinary powers of a chancellor are, as a general rule, reserved for the vigilant suitor.

The motion to continue the special injunction is denied.

C. H. Gross and Thomas J. Barger, Esqs., for injunction.

J. B. Townsend, Esq., contra.

[Leg. Int., Vol. 30, p. 76.]

BURNS *et al.* vs. COX.

An administratrix who assumes the charge of real estate will be liable to account for the highest rent that can be obtained, but she may show that she has used all possible diligence, and then she will not be charged for rent not received.

In equity. Exceptions to master's report. Opinion delivered *March 1, 1873*, by

PEIRCE, J.—The defendant was administratrix to the estate of her former husband, Samuel Bisbing, who died in 1858, intestate, since which time she has in part collected the rents of the real estate left by him, and occupied a portion of it herself. This bill was filed to compel her to account to the complainants, who are grandchildren of the said decedent, for their shares of said rents. *Landis vs. Scott*, 8 Casey, 495, decided that an executor who, without authority, assumed the charge of the testator's real estate, is liable to account to the devisees as a trustee or agent; and if he occupied a part of the real estate of his principal, that he is chargeable with the highest rent that could have been obtained for it.

An administratrix is in like manner chargeable. And the rule laid down in *Landis vs. Scott* is, that she is *prima facie* chargeable with all the rents, and can only be discharged by proof that she did not collect them, and could not have done so by the faithful exercise of due diligence, within the limits of the powers which she possessed.

The master has mainly acted on this rule in charging the defendant, but he seems to have gone somewhat beyond it in a few items of surcharge which he has made against her.

The respondent in her testimony says. "When I got the property in

1864, I found tenants in the frame house at a low rent; I notified them in the latter part of 1870 that the rent was raised for 1871, and they moved out, and the house lay idle for two months. The tenants who were in when I raised the rent left with two months' rent unpaid, and it was two months before I got new tenants in—four months' rent lost. I advertised it, and did all I could to rent it, but property out there does not rent well in winter. Wm. Bramble was the tenant who left with two months' rent unpaid. He only had one-half of the house, renting at \$7. The tenant on the other side still remains; his name is John Gilfoyl." There should be a credit allowed her on account of these losses of \$28.

Again, she says: "I rented the brick house up to the time I went in from 1864, to two families, for \$13 a month for both, and collected all the rents except \$30, which I lost, \$20 from one family, and \$10 from the other, upon notifying them to quit. There were no goods on the premises from which I could collect that rent, that is, over \$300. I wanted \$10 for the two rooms for which \$5 had been paid, and \$15 for the two rooms for which \$8 had been paid; they refused to give it and left. I had no written lease with these tenants." She should be allowed a credit for these losses of \$30.

She further says: "I went into house (brick house), April, 1867, because the house was idle and vacant; and then, after leaving, in November, 1867, I rented the house to Wm. Callahan, my brother-in-law, for \$25 a month. They stayed two months; then for a month it laid idle. Then I rented it to Mr. Miller for \$25 a month, and he occupied it up to August, 1868, when I moved in again. He did not pay two months, and I had to notify him to quit. I lost the two months' rent of \$50; he moved out at night and took the keys with him; part of the house was not furnished; he had some nice furniture in the parlor. He was an officer in the almshouse, and was put out and left secretly. Miller's salary was only \$25 a month; he was a head nurse and had a family."

The master says: "No allowances are made for rent lost by non-occupancy or absconding tenants, because it has not been affirmatively shown, in the cases where the defendant has particularized such losses, that she took the proper precautions to avoid these losses, her testimony showing exactly the reverse; in one instance of loss she even rented the brick house to a tenant at \$25 per month, who she knew received only \$25 per month."

The evidence does not show that she knew it when she rented him the house, and it is but fair to infer that she only learned it when she went to her counsel, Joseph B. Townsend, Esq., who was then a guardian of the poor, to see about collecting this rent. Besides, she had collected four months' rent of Miller, he having been in the house about six months. She should be allowed, therefore, one month whilst the house laid idle, \$25, and the two months' rent lost by Miller, \$50.

The defendant had the largest interest in this property herself, and the evidence certainly shows that she endeavored to increase the rents of the properties, and that some of the losses were made in her efforts to do so. It also shows efforts made to rent the property when it was vacant, and that she moved into the brick house because it was vacant.

Landis vs. Scott decides, that an accountant, such as was this administratrix, was only answerable for the exercise of due diligence, and where such was exercised that she would not be chargeable with what she was unable to collect.

The accountant should therefore be credited with the foregoing sums, amounting in the aggregate to one hundred and thirty-three dollars, which should be deducted from the net balance of rents as found by the master.

With these corrections, the master's report will be confirmed, and the other exceptions dismissed, with costs to be paid by defendant.

Henry T. King, Esq., for plaintiffs.

E. K. Nichols, Esq., for defendant.

[Leg. Int., Vol. 30, p. 76.]

ALLEN vs. BENNERS *et al.*

An injunction will be granted to restrain the sale of a wife's property for the debt of her husband where her title is clear and undoubted.

Sur bill, answer and proofs. Opinion delivered *March 1, 1873*, by **PEIRCE, J.**—In *Hunter's Appeal*, 4 Wright, 194, the jurisdiction of a court of equity to restrain by injunction the sale of a wife's property for the debt of the husband, is put upon the ground that the acts of 1848 and 1850 declare, that the separate property of a married woman shall not be subject to levy and execution for the debts and liabilities of the husband, and that, therefore, such a case is within the fifth clause of the third section of the act of 16th June, 1836, which gives the courts jurisdiction in equity "for the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals."

A clear case of title in the wife must be shown, otherwise a court of equity will not interfere, but leave the creditor to pursue his process, and the purchaser at the sale to establish his title in ejectment.

So in *Winch's Appeal*, 11 P. F. Smith, 424, it is said, "where the title of the wife is disputed, and where the creditor has the right to proceed against the property to test her title, it is error to assume jurisdiction, and enjoin against the creditors' execution, and thus to withdraw contested facts from a trial by jury."

It is presumed that the Supreme Court by the words, "disputed title" and "contested facts," means something more than a mere unsupported allegation on the one side, or unsupported denial on the other, but that the dispute and contest are supported by evidence that will require a trial by jury to settle the merits of the controversy between the parties.

If, therefore, the evidence is such that the court could not sustain the verdict of a jury upon it against the title of the wife, the jurisdiction of a court of equity to restrain by injunction the sale of the wife's property would be properly exercised.

The evidence in this case was given exclusively on behalf of the complainant. The defendants gave no evidence. It shows that the purchase-money of the property claimed by the wife was \$3,500, subject to a mortgage of \$2,500, which still remains upon the property. The

evidence is, that the wife paid all this purchase-money out of her own means, and that no part of it was paid with the money of her husband; that the wife before her marriage had been a saleswoman in a store, and at the time of her marriage in October, 1859, had accumulated \$1,900 or \$2,000; that she had invested a part of her money in three hundred shares of "The Philadelphia and Campano Sulphur Mining Stock," at \$1.00 per share, which she afterwards sold at \$5.50 per share, making a profit of \$1,350 on it; that she had about \$600 of gold which she had sold during the war at a premium of 185 per cent., and that she had money invested in United States bonds.

Assuming it to be true that she had \$1,900 in 1859, and that she made a profit of \$1,350, on her Sulphur Mining Stock, and that her money was kept invested at interest from 1859 to 1868, when she purchased the property, it shows that she had more than a sufficient sum of money to pay the purchase-money of the property. This testimony was not disputed by any evidence whatever on the other side. The utmost that the learned counsel for the defendants objects to it is, that from her earnings she could not have had more than eleven or twelve hundred dollars in 1859, and that that sum, with its accumulated interest, would not amount to a sufficient sum to purchase the property costing \$3,500 in 1868. That is true, but it leaves out of view the profits on the Sulphur Mining Stock, and the premium on the gold, which is presumedly the gold which she got for interest on her United States bonds.

As this evidence is undisputed, and both husband and wife, who are competent witnesses, swear that not one dollar of the purchase-money was paid by the husband from his own means, it is difficult to perceive how a court could support a verdict against the title of the wife, and against this undisputed evidence.

It seems unnecessary, therefore, to send such a case as this to a court of law, with its further delay and expense to the wife. She is entitled to the equitable interference of this court by injunction to restrain the defendants from proceeding to sell the said property as prayed for by the bill.

Decree for complainant, with costs.

P. T. Ransford, Esq., for plaintiff.

J. Cooke Longstreth, Esq., for the defendant.

[Leg. Int., Vol. 30, p. 84.]

SCHLICHTER vs. SCHLICHTER.

The libel in divorce must allege "cruel and barbarous treatment." It is not sufficient merely to prove it by depositions.

Opinion delivered *March 8, 1873*, by

PAXSON, J.—This was a rule to show cause why the libel in the above case should not be stricken off for want of jurisdiction.

The application is made on behalf of the husband, who is the libellant. The ground of divorce, as set forth in the libel, is, that the respondent has offered such indignities to the person of the said libellant, as to make

his condition intolerable, and his life burdensome, and thereby forced him to withdraw from his home and family. Various specific acts of improper conduct are alleged, tending to support this general charge, and if the husband were entitled to a divorce upon the ground above stated, they would probably be sufficient. In order, however, to entitle the husband to a divorce, he must allege "cruel and barbarous treatment." It is not sufficient to set forth merely "indignities to the person." The act of 1855 does not extend the grounds of divorce; it merely enlarges the jurisdiction of the courts over parties. This subject is so thoroughly discussed in *Gordon vs. Gordon*, 12 Wr. 228, and *Jones vs. Jones*, 16 P. F. S. 494, that any further reference to it would seem to be unnecessary.

The respondent resists this application, and alleges that while the libel does not charge "cruel and barbarous treatment," the testimony proves it. The depositions have not been submitted to the court, and I only state the construction placed upon them by the respondent herself. Assuming that she is not mistaken upon this point, we must decide the case upon what is before us. The test of the jurisdiction is the libel, not the evidence in support of it. Measured by that standard, it is clear that no sufficient cause of divorce appears on the face of the pleadings.

A number of authorities were cited on behalf of the respondent, to show that in a suit for divorce, the libellant may not discontinue at his or her option. The authorities all refer, however, to cases where the court had jurisdiction. Of what avail would it be to proceed in this cause? We could not make a valid decree. The whole proceedings before us are void *ab initio*. In such case we would not allow the parties to proceed, after the defect had been called to our attention, even if they mutually desired it, for the reason that consent cannot confer jurisdiction; and especially so in proceedings for a divorce.

Rule absolute.

F. C. Brewster, Esq., for rule.

A. A. Hirst, Esq., contra.

[Leg. Int., Vol. 30, p. 84.]

CROASDALE vs. BROWN.

Where a statement of the record of an assignment refers to a book which is not in the recorder's office, the mistake is fatal to the action.

Rule for judgment for want of a sufficient affidavit of defence. Opinion delivered March 8, 1872, by

PAXSON, J.—Plaintiff sued for arrears of ground-rent, and filed a statement under the act of assembly, of the record of the assignment of the ground-rent, referring to the book and page. The affidavit of the defendant states that there is no such book in the recorder's office. It is evident a mistake has been made in describing the volume. It is fatal to the present application.

Rule discharged.

R. R. Croasdale, Esq., for rule.

W. A. Manderson, Esq., contra.

[Leg. Int., Vol. 30, p. 84.]

SIMMS vs. BROUSE.

Unless plaintiff can show that he was actually a partner, an injunction will not be granted or a receiver appointed.

Opinion delivered *March 8, 1873*, by

PAXSON, J.—This was a motion for a special injunction, and for the appointment of a receiver. A large number of affidavits have been submitted for and against the motion. The plaintiff fails to make out a partnership. The most the affidavits establish is an agreement for a partnership; the plaintiff to put in a certain amount of money. He does not even allege that he contributed his quota of the capital. He does, indeed, say that he put in ninety dollars. Three persons, however, swear that this was a loan. It has been in whole or in part repaid. Yet the plaintiff, who put in nothing, and owns nothing, asks us to appoint a receiver, and enjoin the defendant from prosecuting his business. We cannot see his equity. If the defendant owes him for wages or services, he has his remedy in a common law court.

The motion for an injunction and the appointment of a receiver is denied.

A. M. Burton, Esq., for plaintiff.

J. W. Hunsicker, Esq., contra.

[Leg. Int., Vol. 30, p. 84.]

PFUND vs. HERLINGER.

Evidence that defendant was enjoined from using demised premises by an *ex parte* injunction issued at the instance of plaintiff, is admissible under plea of "eviction" in an action for rent.

Rule for new trial. Opinion delivered *March 8, 1873*, by

PAXSON, J.—This was an action of covenant to recover one month's rent alleged to be due under the lease. The defendant pleaded "eviction," and in support of said plea offered in evidence the record of a suit in equity in this court, showing an *ex parte* injunction issued against defendant at the instance of plaintiff, by means of which defendant was enjoined from using the demised premises as a flour and feed store during the month for which the rent was claimed. (For opinion of the court see 29 Leg. Int. 68.) The lease permits the use thereof as a store, without any limitation as to the nature of the business. The injunction was dissolved upon the hearing. The admission of this evidence was objected to, and the objection overruled. The verdict was for the defendant.

An eviction by the landlord is a complete answer to a demand for the rent during the period covered by the eviction. It does not suspend rent due prior to the eviction; nor rent accruing subsequent thereto, if the defendant remain in possession after the eviction is over. It is a well-settled principle that there may be an eviction of a part only of the demised premises; yet the rent is thereby suspended as to the whole thereof. The landlord, by his own unlawful act, cannot apportion the rent in such a case.

Was this an eviction? That it was a disturbance of the tenant's rights

there can be no question. We think it was more, and amounted to an actual eviction. There might be an interference with the tenant's enjoyment of the premises, amounting to a trespass, and yet not be an eviction. But here the tenant was deprived by the landlord of all beneficial use of the property; he was restrained from using it in the very manner authorized by the lease. Of what use is a store to a tenant when the landlord has stationed an officer of the law at the door with a writ of injunction in his hand, which the former may not disobey under pain of fine and imprisonment?

It is well that parties who obtain *ex parte* injunctions should understand that they are responsible for all the consequences resulting therefrom. If without proper cause, they are not only liable upon the injunction bond, but may be held to be responsible by way of defence, instead of the circuitry of an action for damages.

It is no answer that the plaintiff was merely seeking a judicial interpretation of his lease. That he could have obtained without peril. But while he was doing so, and pending the proceeding, he assumed to decide his own case, and invoked the "strong arm of the law" to stay the hands of the defendant.

Rule discharged.

S. N. Rich, Esq., for rule.

John Flint, Esq., contra.

[Leg. Int., Vol. 30, p. 64.]

STOKES vs. FENNER.

1. It is no objection to the admission of plaintiff's book of original entries, because the charges contained therein had been posted in the ledger, which was not produced. Defendant could have compelled production of the ledger by notice.
2. Evidence of the usage of the trade may be admitted to explain an ambiguous contract, not to contradict it.

Rule for new trial. Opinion delivered *March 8, 1873*, by

PAXSON, J.—This was an action for goods sold and delivered. The admission of plaintiffs' book of original entries was objected to upon the ground, that the bookkeeper, who made the entries, having stated upon cross-examination, that the charges contained therein, had been posted into a ledger, the book itself was not admissible without the production of the ledger. *Prince vs. Swett*, 2 Mass. 537, was cited in support of this objection. This case, though cited in *Greenleaf and Starkie on Evidence*, is very meagrely reported. The statement of the facts occupies but five lines, and the opinion of the court is as follows: "When an account is transferred to a ledger from the day-book, the ledger should be produced, that the other party may have the advantage of any item entered therein to his credit." It does not appear that this case has ever been recognized as authority in this State, to the extent now claimed for it. The practice has been uniform the other way. The defendant would undoubtedly have a right to the production of the ledger, upon notice, and could compel it, under the act of assembly. Here, no notice was given to the plaintiffs to produce the ledger at the trial. They were not bound to have it there without notice, and could not have given it in evidence if they had produced it. The day-book was offered, not

as one of a series of books so connected together, that one is not admissible without the other, but as the book containing the *original charges* against the defendant, and which are *prima facie* evidence against him. If the latter had reason to believe the plaintiffs had other books containing charges favorable to him, he could have compelled their production as before stated.

The defendant further offered to prove, that by the custom of plaintiffs' trade in this city, goods of like character were sold twenty-five per cent. off. Plaintiffs had proved, that they sold only for net cash, and never made the discount indicated in defendant's offer. I excluded the testimony, and this is assigned for error.

The authorities cited by the defendant, do not sustain his position. While the usage of trade does not amount to technical custom, it may, perhaps, be shown in some cases, to explain an ambiguity in a contract, as if a bill be sold for net cash, the usage of trade might be shown to prove what net cash means. Or, if it were with "the usual discount off," the custom of the trade would be competent to show what was the usual discount. But where one merchant sells for cash without discount off, he certainly is not bound by the fact, that other merchants in that same line are accustomed to sell with a discount off.

Rule discharged.

Silas W. Pettit, Esq., for rule.

Jacob C. Bowers, Esq., contra.

[*Leg. Int.*, Vol. 30, p. 84.]

GORDON vs. MILNE.

When the foundation of a wall is partly on plaintiff's and partly on the adjoining land, although the wall after it rises is *all* on defendant's land, still it will be considered a party-wall and subject to the rules concerning party-walls.

In equity. Opinion delivered *March 8, 1873*, by

PAXSON, J.—This was a demurrer to plaintiff's bill. The important point to be decided is, whether the wall between the properties of the plaintiff and defendant is a party-wall. If it is, then the openings therein, under the authority of *Vollmer's Appeal*, 11 P. F. S. 118, are in violation of law, and a nuisance which a court of equity will abate.

Defendant is the owner of a lot and factory on the south side of Lombard street, adjoining the lot and dwelling of the plaintiff. Some years ago, the father of the defendant, from whom the latter derived title, erected a wall on the line between his property and that of the plaintiff. The foundation of the entire wall was laid, as is usual in the case of party-walls, upon the line between the two properties. Upon this foundation, a party-wall was built from Lombard street, southward, forty feet. At this point, the said wall for the distance of thirty-nine feet one and a-half inches southward, recedes westward for the space of four and a-half inches, to the line of defendant's property. So that this portion of the wall, although the foundations thereof are partly upon the plaintiff's ground, is built entirely upon defendant's lot, after it rises above the cellar. In this portion of the wall thus set back, have been placed a number of openings or windows, which are the cause of the present complaint. That said openings are a source of very serious

annoyance to the plaintiff and his family, is apparent from the title, and is conceded by the demurrer. Has the defendant a right to maintain these openings?

It must be conceded that if the defendant, or those under whom he claims, had constructed this portion of the wall entirely upon his own property, he would have had the right to leave openings therein. But having used his neighbor's ground, in part for his foundation, can he, by receding at any point above to his own line, deprive the adjoining owner of the substantial benefits of a party-wall? One of those benefits is the right to build thereto upon making compensation; another is the right to have a solid wall (without openings) of brick or stone, or other incombustible materials. "If the first builder does not comply with the law, and make the wall a solid one, he becomes a trespasser and wrongdoer." In *Vollner's Appeal*, and other cases cited, in which the parties had been enjoined from using openings, the walls were admitted party-walls their entire length and height. It would seem, however, as if the present case comes within the reason of the rulings referred to. The character of the wall must be determined in part from its foundation. If the builder starts the latter upon the line, and thus takes the land of the adjoining owner, he must carry it up strictly as a party-wall, or at least, in such manner, as to give the adjoining owner all the benefits of such a wall. Otherwise, the land of the latter would be taken without any corresponding benefit.

The demurrer is overruled.

Wm. McCandless, Esq., for plaintiff.

E. Coppee Mitchell, Esq., for respondent.

[Leg. Int., Vol. 30, p. 84.]

ASSIGNED ESTATE OF TRUITT, BROTHER & Co.

1. An assignee may be charged in his second account with items received prior to the filing of his first account.
2. An assignee will be charged with interest on balances in his hands, where he has neglected to perform his duties faithfully.
3. *Brown's Estate*, 8 Phila. Rep. 197, followed and approved.
4. The inventory is *prima facie* evidence of the amount of the assignee's liability.
5. An interested witness and party cannot prove a writing which was made prior to the death of the other party.

Opinion delivered March 8, 1873, by

PAXSON, J.—This case "bristles with exceptions." Thirteen have been filed on behalf of Jos. B. Dunn, the present assignee, and fifteen on behalf of the administrator of Charles Boggs, deceased, the former assignee. A considerable number of said exceptions relate to alleged errors of the auditor upon the facts. As the evidence has not been brought up, we have no means of correcting his rulings thereon, if erroneous. This disposes of the 1st, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th exceptions filed by Mr. Dunn, and of the 10th, 11th, 12th, 13th, 14th, and 15th exceptions filed by the administrator of Charles Boggs. In disposing of the remaining exceptions, we will take up first, those filed on behalf of Joseph B. Dunn, the present assignee.

The second of said exceptions alleges error in ruling out certain items, because they were received by Mr. Boggs, prior to the filing of his first account, although not included therein.

The assignment is dated September 20, 1861, and the first account was filed December 13th, 1862. Charles Boggs, the assignee, died on November 21st, 1868. The auditor reports, that in his opinion, the investigation is limited to transactions between the filing of the first account, and the death of the assignee. The reason for this conclusion is, that the terms of the reference do not extend beyond the time referred to. The present assignee presented his petition to the Court of Common Pleas, praying for a citation against the administrator of the former assignee, to show cause why an account should not be filed. The petition sets forth, that the petitioner "has reason to believe and avers, that assets of the said estate to a large amount came to the hands of the said Charles Boggs, after the filing of his said account, of which no account whatsoever has been rendered." To this petition, and the citation issued thereon, the administrator filed an answer, setting forth his inability to file such account, for lack of materials so to do, and his want of knowledge as to the condition of the assigned estate. Whereupon, an auditor was appointed by the court to state a second account.

I do not think the averment in the petition, that assets came into the hands of the first assignee, after the filing of said first account, of itself limits the auditor to such items. The order to him is to state an account; the statement referred to in the petition is merely the reason why such account should be stated. In so stating it, everything not previously accounted for should be included.

It was alleged, however, by the learned counsel for the administrator of the first assignee, that as to all matters which were, or might have been passed upon by the auditor on the first account, the confirmation of his report is conclusive as to all the world: *Moore's Appeal*, 10 Barr, 435; *Groff's Appeal*, 9 Wr. 379; *Taylor vs. Cornelius*, 10 P. F. S. 187; *Weber vs. Samuels*, 7 Barr, 526; and *Rhoad's Appeal*, 3 Wr. 186, were cited in support of this view. All of these cases refer to matters which were either embraced in the prior account, or were known to parties, and might have been the subject of surcharge in said prior account. None of them reach the case of an accountant who has received divers sums of money, which he has altogether omitted from his account, and of which the creditors had no knowledge. This amounts to fraud. I am not aware that it has ever been held, that an accountant, who by either fraud or mistake, omits to charge himself in his account with money actually received by him, may not be sur-charged therewith in a subsequent account. To do so, would open a wide door to fraud. This exception is sustained.

I think the eleventh exception is well taken. The auditor does not give us any reason for declining to charge the former assignee with interest on balances in his hands. This assignee utterly neglected his duties for years, kept no accounts of the estate, wasted the assets in debauchery, leaving his successor in the trust, the creditors and his unfortunate securities in the dark as to the condition of the estate. This question was fully discussed in *Brown's Estate*, 8 Phila. Rep. 197. The auditor would do well to adopt the rule pursued in that case, in allowing a proper balance for contingencies, and a reasonable time for investment.

The twelfth and thirteenth exceptions are also sustained to the extent of charging the said Charles Boggs with the amount of the inventory

filed, less the amount accounted for in the prior account. The inventory is *prima facie* evidence of liability. It is for the accountant to discharge himself therefrom. This he may do by showing items already accounted for, or which could not be collected. The auditor has not formally charged the assignee with the inventory. In fact, he has not stated an account at all in the proper sense of the term. These errors of form can be corrected in a supplemental report.

It remains to dispose of the exceptions filed by the administrator of Charles Boggs.

I see no error in admitting in evidence the letter-book, containing press copies of letters from Charles Boggs to the creditors. It was the assignee's own book, and was evidence against him. *Foot vs. Bentley*, 44 N. Y. R. 166, does not apply. This disposes of the first exception. The second is dismissed for the reason that this case is not within the bar of the statute, or of any analogy thereto. The third and fourth exceptions are virtually disposed of by what has already been said in another part of this opinion. The fifth exception is novel. It is alleged that the auditor should not have sur-charged Charles Boggs with any items for the three years next preceding his death, because of his continued intoxication during that period. This exception is dismissed. Nor do I see the force of the sixth exception. The question as to the indorsement of Charles Boggs, is not one of reasonable doubt, but of the weight of the evidence. I cannot say the auditor was wrong. The seventh, eighth, and ninth exceptions all refer to one question, viz.: The admission of the evidence of Charles B. Truitt, Samuel L. Kreutzborg, Joseph H. Dunn, and Thomas D. Watson. It was objected, that these witnesses were all incompetent by reason of interest; and that they are not admissible under the statute, because their testimony relates to matters prior to the death of Charles Boggs. Of these witnesses, the first and second were the assignors; the third is the present assignee. Each of these is a party to the record, and for that reason incompetent to testify as to any facts occurring prior to the death of Charles Boggs. It is alleged, however, that Dunn was only called to prove the handwriting of Mr. Boggs. But the very writing which Dunn was called to prove, was made or executed prior to the death of Mr. Boggs. The latter is not here to speak in regard to it.

We think this case comes within the prohibition of the act of assembly.

But no such objection applies to Thomas D. Watson. He is not a party, nor had he any interest. His testimony, therefore, was properly received. The three exceptions last named are sustained to the extent of excluding the evidence of Truitt, Kreutzborg, and Dunn, and all of the items referred to, so far as they depend exclusively upon their testimony.

The 7th, 8th, and 9th exceptions filed by the administrator of Charles Boggs, are sustained. The balance of his exceptions are dismissed.

The 2d, 11th, 12th, and 13th exceptions filed by Joseph B. Dunn, are sustained. The balance of his exceptions are dismissed. The account is referred back to the auditor with directions to amend the same in accordance with this opinion.

E. Spencer Miller, Esq., for J. B. Dunn, assignee.

H. J. McCarthy and J. P. Montgomery, Esqs., for Charles Boggs' administrator.

[Leg. Int., Vol. 30, p. 85.]

IN RE CHARTER OF "THE REV. DAVID MULHOLLAND BENEVOLENT
SOCIETY OF MANAYUNK."

Charter will not be approved where membership is not restricted to citizens of this commonwealth, or where there is a provision that membership is to be forfeited upon enlistment in the army or navy.

Opinion delivered *March 8, 1873*, by

PAXSON, J.—We commend the object of this association, but we cannot give the charter our approval for two reasons, viz. :

1. The membership is not restricted to citizens of this commonwealth, and

2. It is provided by Article 11th, that any member "enlisting in the regular army or navy shall thereby forfeit his membership and all claims on the society."

We will not approve a charter with such a clause as this. It is against public policy. A corporation which is a creature of the law ought not to proscribe its members for aiding the government which creates and protects it.

[Leg. Int., Vol. 30, p. 92.]

MARTIN vs. McDEVITT.

Will construed to pass a fee and not a life-estate.

Case stated. Opinion delivered *March 15, 1873*, by

PAXSON, J.—The question which this case stated raises for our determination is, whether under the second paragraph of the will of Mary Martin, deceased, an estate in fee passed to the devisees. The language of the will is as follows:

"2d. I order to my son Michael, and my daughter Ellen, the house in which I now reside, No. 4353 Main street, Manayunk, to be divided equally between each of them."

The commencement and conclusion of this will are evidently copied from a form book. The devising part of it is inartificially drawn, as the paragraph above cited indicates. The will is short, and the testatrix signs by her mark. There is no limitation over.

Did the testatrix intend to give her son and daughter a fee in the house? If she did, her intention must govern, as there are no words in the will to control it.

She appears to have disposed of all her property. To her daughter Anne she gives \$300; to her granddaughter \$100; while her furniture is ordered to be sold, and the proceeds given to her daughter Ellen. Are we to presume that she intended to give Michael and Ellen a life-estate only in the house, and to die intestate as to the remainder? On the contrary, we think the intention, gathered from the four corners of the will, manifest that she designed to give a fee, and not a mere estate for life.

Judgment for the plaintiff in the case stated for the sum of one hundred dollars.

Edward R. Worrell, Esq., for plaintiff.

D. B. Meany, Esq., for defendants.

[Leg. Int., Vol. 30, p. 100.]

WEST PHILADELPHIA PASSENGER RAILWAY CO. vs. SAML. C. PERKINS *et al.*, Commissioners for the Erection of Public Buildings, and the City of Philadelphia.

1. The building commissioners have no right to obstruct the Market street railroad in their route along Market street.
2. The railroad company has no right to alter its course, nor can the commissioners confer such right upon them.

Opinion delivered *March 22, 1873*, by

ALLISON, P. J.—The motion made and argued by the defendants, asks the court to dissolve the preliminary injunction granted on the 14th October, 1872. The order restrained the defendants, until hearing, from removing, cutting, or in any manner interfering with or disturbing the track of the West Philadelphia Passenger Railway Co. upon Market street, between Merrick and Juniper streets, as the same now exists, or from abridging or preventing their use or enjoyment.

The averments of the bill are not denied; on the contrary, they are fully confessed by the defendants, and the motion before us rests solely upon the act of assembly, approved the 5th of August, 1870, (P. L. of 1871, page 1548,) to provide for the erection of public buildings to accommodate the courts, etc., of the city of Philadelphia.

The defendants claim that this act confers not only the authority, but imposes upon them the duty, of erecting the proposed buildings upon the ground now covered by the tracks of the railway of the plaintiffs, and assert their intention to proceed to take up said tracks on Market street, between Merrick and Juniper streets.

Have they the authority, as the case now stands, to carry into effect this purpose?

The act of August 5, 1870, gives forth no uncertain or doubtful utterance. The commissioners have full power to procure plans for the buildings, employ all necessary agents to construct them, to "do all other acts necessary in their judgment to carry out the intent of said act in relation to said public buildings." They may make all needful contracts which are made valid and binding in law upon the city, and "they shall have authority and are empowered to vacate so much of Market and of Broad streets as they may deem needful." It does not appear from the bill filed by the plaintiffs that there has been any formal execution of this power to vacate the portions of these streets which lie between Merrick and Juniper streets; but in the most practical manner they are about to take them from the public as highways, and to take them from the plaintiffs also for the use of the railway, thus cutting their road in two and depriving them of all lawful connection between the portions of the track which extend eastward and westward from the site of the buildings to be erected.

There are, however, important considerations set up in the bill against this admitted purpose of the defendants. The plaintiffs claim a grant from the Legislature, approved May 14th, 1857, to use the portion of Market street in question for the construction of their railway: (P. L. 1858, page 585. This grant gives to them the authority to construct a double or single track of railway from the intersection of Till, now

Fortieth street, and Washington or Market street, extending along said Washington and Market streets, to Delaware Third street; a power which was carried into effect shortly after this act became a law. The railway built under this authority has been in constant use from the first hour of its completion; the corporation has, therefore, lost none of its powers or franchises, by failure to use them; nor is it pretended that there has been any relinquishment or surrender of such powers by the company.

Upon the faith of this grant the plaintiffs have expended their money, built and stocked their roadway, and have ever since been subject to constant and heavy outlay in the working of their road. That the property thus acquired, both as to corporate franchises and actual investment of capital, is of great value, will not be questioned. All this is the private property of the plaintiffs, which they are entitled to hold and to enjoy, as against all claimants, except such as can show a superior title, even against the State itself, unless it is taken away from them by clear and unquestionable authority, and by the exercise of a right within the reserved powers of the Constitution, expressed or implied. But it is upon the Constitution that the plaintiffs plant themselves in resisting this attempt to take from them their property under the act of assembly, which is claimed by the defendants as their protection and justification. Private property may not be taken for public uses unless compensation is first made or secured to the owner. This has not been done, or attempted even to be done, by the defendants; they have not sought to condemn this property that they may use it for a public purpose; they do not claim that, under the general laws of the Commonwealth, the city or the State is bound to make compensation; or that, by any known legal machinery, the defendants can make good out of the public treasury the loss which will fall upon them by the substantial destruction of their corporate franchises and capital invested. Of what force then is the direction contained in the act of 1870 to vacate portions of Broad and Market streets, and to use them as the site of the new public buildings? The answer is easily found in the constitutional prohibition referred to. As it stands it is a dead letter, so far as it involves the destruction of the rights of property of the plaintiffs, or the appropriation of such property, without paying or securing just compensation to the plaintiffs. It is true, that defendants have proposed to give a new line or route of railway to the plaintiffs, as a substitute for that which they intend to take from them. This route diverges from complainants' tracks at their intersection with Merrick street, and is carried around the north and south side of the site of the new buildings, intersecting again with the present railway at Broad and Juniper streets. These lines of railway have already been constructed by the defendants. This would be satisfactory if it were not for two substantial objections: First, the plaintiffs have not the power to accept the offer of the defendant; and, second, the defendants possess no such rights as they propose to confer on the plaintiffs. The authority to lay a road upon Market street having been exercised under the grant of power by the Legislature, such power is exhausted. This right cannot be exercised over again, under the original grant, and new and different tracks be laid down in place of those already constructed, much less can a track or tracks upon different streets

not specially authorized, be accepted or used for railway purposes in lieu of the present railway on Market street. It is equally clear, that the law under which the defendants are proceeding to construct the public buildings, does not confer upon the city of Philadelphia the right, either to build a railway upon the streets surrounding the ground to be occupied by the buildings, nor does it authorize the Market street company to construct such railway, or to acquire or use any corporate franchises thereon. This offer, therefore, though showing a proper desire on the part of the defendants to protect the plaintiffs from injury to their corporate rights and property, must be regarded as wholly failing in its purpose, and in any event would be subject to the acceptance of the plaintiffs. Such acceptance, being without legislative sanction, could not be attempted even to be carried into effect by plaintiffs without peril of forfeiture of the unquestionable rights which they now possess.

The order of the 14th of October, 1872, is therefore continued until final hearing, or until the further order of the court. Should a satisfactory arrangement be entered into, under proper legal sanction, by the parties to this suit, a modification or abrogation of the order may be applied for hereafter.

Theodore Cuyler, Esq., for plaintiffs.

C. H. T. Collis, Esq., City Solicitor, for defendants.

[Leg. Int., Vol. 30, p. 109.]

PENNINGTON vs. PENNINGTON.

In a libel for divorce by a husband against a wife, he must allege that the respondent by her "*cruel and barbarous treatment*," rendered his condition intolerable or life burdensome.

The act of March 9, 1855, does not alter this rule.

Opinion delivered *March 29, 1873*, by

ALLISON, P. J.—This case has been before us in several aspects. At the instance of the husband a divorce was decreed upon testimony taken before an examiner.

Upon the application of the wife, the decree was set aside upon proof of the fact that the parties had never in fact separated; upon testimony called in support of alleged fraudulent service of requisite notice upon respondent, and that part of the testimony was taken at a place different from that set forth in the original notice without the knowledge of respondent, and upon alleged material defects in the libel.

From this decree the libellant appealed, and was *non prossed* in the Supreme Court; the record was brought back on remittitur and is now before us upon demurrers to this libel.

The three specifications or assignments of causes of demurrer take exception to the sufficiency of ground for divorce, as set out in the libel.

The application for divorce is on the part of the husband, under the act of the 8th of May, 1854, in which it is made a cause for annulling a contract of marriage, at the instance of the husband, "where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable or life burdensome."

The libel alleges a marriage with respondent, about the 7th of April, 1850, and assigns for cause that the respondent, Christiana Pennington,

before and subsequent to the 1st of March, 1870, "offered such indignities to his person as to render his condition intolerable and life burdensome, and thereby forced himself to withdraw from her."

This is not an exact or liberal following of the act of 1854, which gives a remedy to the husband, which he did not before the passage of the act possess. It will be noticed that the pleader has entirely omitted to charge, in the language of the law, that the treatment which he received from his wife was cruel and barbarous; and has inserted as a substitute for cruel and barbarous treatment, *indignities to his person*, which rendered his condition intolerable and life burdensome; to which he has added, "and thereby forced himself to withdraw from her." The last clause, if intended to meet the requirements of the act of 1854, is wholly unnecessary, as will be seen by a careful reading of it; nothing is said about the husband being compelled to withdraw from association or cohabitation with his wife; this, therefore, may be regarded as mere surplusage, it being immaterial whether the husband remains with or withdraws himself from his wife, if it be shown that her treatment was cruel and barbarous to the extent of rendering his condition intolerable or life burdensome.

The framing of this portion of the libel seems to have been based on the act of the 1st of March, 1815, which made it a ground for divorce of the wife from the husband when it could be shown that he had offered such indignities to her person as to render her condition intolerable or life burdensome, and thereby forced her to withdraw from his house and family; for it will be seen that the ground of complaint set out in this libel is that of indignities offered to the person of the husband. The pleader did not venture to follow the act of 1815 by alleging, in the language of that act, a withdrawal by the husband from the house and family of the wife, if indeed a wife cohabiting with a husband, or living under the same roof with him, can in any proper sense be said to have a house and family from which the husband could withdraw himself, but whether this be so or not, the act of 1854 is entirely silent upon this point. It may here be remarked, that if this was an essential part of a libel filed by a husband, under the act of 1854, construing the acts of 1815 and 1854, as in *pari materia*, this allegation is evasively stated; the phrase to "withdraw himself from her," is by no means equivalent to the charge, that one was forced to withdraw from "the house and family" of the other. One implies a discontinuance of cohabitation and association; the other, a separation from the house or dwelling in which the parties had up to that time resided, and from the family as well. This, however, is explained by the fact that at the time the libel was filed the parties were living under the same roof.

There had been no actual separation, and the wife's testimony is, that even cohabitation was maintained during all the time the proceedings for divorce were in progress.

But although the act of 1815 cannot be made to apply to a case in which the husband is the actor in a suit of divorce, yet inasmuch as the law of 1854 was in force when this libel was filed it can be supported, notwithstanding the misapprehension of the pleader, if he had brought his case fairly within the requirements of the latter act. This we think he has not done; the point seems to have been ruled in *Jones vs. Jones*,

16 P. F. Smith, 497. The court say, it is evident the Legislature, in the act of 1854, intended to narrow the cause of divorce in the husband's case to cruel and barbarous treatment, leaving out indignities to the person, which are causes of divorce for the wife under the act of 1815, under the belief, no doubt, that for the latter the husband needed no protection by a severance of the relation. This distinction, which is clearly stated by Mr. Justice Agnew, is made a material one, and grows out of the different acts of assembly, intended to meet different classes of cases, the court holding that while the act of 1854 intended to give relief to a husband who was treated with cruelty and barbarity by his wife, so that his condition was rendered intolerable or his life burdensome, it does not give him a standing in court or entitle him to a divorce from his wife where he complains merely of indignities to his person, which may fall far short of cruel and barbarous treatment, even though he may consider personal indignities as rendering his condition intolerable and life burdensome. Personal annoyances and indignities may be made up of acts that are cruel and barbarous, but in many instances they may not even approximate to actual personal violence, or the reasonable apprehension of it, or such a course of treatment as endangers life and health and renders cohabitation unsafe. This definition of cruel and barbarous treatment, laid down by Judge King, in *Butler vs. Butler*, 1 Parsons Eq. Cas., 341, has been often approved, and is adopted by the court in *Jones vs. Jones*, above cited.

I think it well to add to that which is already stated, that it has been questioned, notwithstanding the case of *Jones vs. Jones*, whether under the act of March 9, 1855, the complaint is not in this case well stated. This act does not seem to have been called to the attention of the court when considering *Jones vs. Jones*. It empowers the Common Pleas to entertain jurisdiction of all cases of divorce for "the cause of personal abuse," or such conduct on the part of either husband or wife as renders the condition of the other party intolerable and life burdensome, notwithstanding the parties were at the time of the occurring of said causes domiciled in another State. We do not regard this as an enlargement of the powers conferred on the courts of this Commonwealth to grant divorces, except that it enables them to determine causes, the offence having been committed in another State. The term personal abuse must be considered in its application to prior laws, making personal abuse or injury amounting to legal cruelty, as defined in *Butler vs. Butler*, and indignities to the person of the wife referred to in the act of 1815, a ground for divorce upon her application, and to cruel and barbarous treatment of the husband, which, under the act of 1854, entitles him to file his petition praying for a divorce. This, we think, is the entire scope and purpose contemplated by the act of 1855.

If this is not the true rendering of this act, then we must hold that under the term personal abuse the husband or the wife may obtain a divorce where the wife has not even been compelled to withdraw from the house and family of the husband, and when her life and health have been placed in no danger; and so also the husband may be divorced from the wife where her treatment of him has not been cruel and barbarous. This would be an enlargement of all prior legislation on this subject, and would give to both parties an advantage, to which they are

not entitled, under the act of 1815 and of 1854, on the single ground that the "personal abuse" was inflicted out of our own State. This is so unreasonable that we cannot believe it to be the true intention of the Legislature.

The demurrers filed to this portion of the libel are sustained. But the libel also charges that the respondent has given herself up to adulterous practices, and has been guilty of adultery. This is a distinct and substantive ground for divorce, which has not been objected to, and, though stated in general terms, is perhaps well pleaded under the long recognized practice which requires timely notification to respondent as to persons, time, place and circumstances to be proved on the trial of the cause in support of the charge.

Joseph T. Ford, Esq., for the demurrers.

W. H. Redheffer, Esq., contra.

N. B.—Since writing the foregoing opinion, my attention has been called to the case of *Sterling vs. The Commonwealth*, 2 Grant, 162, in which I find a similar view is taken of the act of 1855, by Judge Agnew, in the Quarter Sessions of Beaver county, in an opinion delivered by him in 1857. He says: "It is clear the Legislature did not intend, in the act of 1855, to substitute as causes of divorce the well-defined expressions, 'cruel and barbarous treatment, and such indignities to the person,' etc., in the acts of 1815 and 1854, by the now indefinite and more general terms, 'personal abuse and such conduct as renders life burdensome,' but simply to rehearse existing causes in this comprehensive way in order to reach the object of the law, by giving jurisdiction, notwithstanding the parties were, at the time of the occurring of said causes, domiciled in another State.

[Leg. Int., Vol. 30, p. 109.]

JOS. M. HANCOCK, one of the Building Inspectors, vs. H. E. THAYER.

1. The word "rural" in the building inspection act of 1855, is not construed the same as in the tax act of 1854.
2. Whenever the neighborhood is so compactly built up, as to give it the character of the built-up portion of the city, the building inspection will apply and be enforced.

Demurrer to answer. In equity. Opinion delivered March 29, 1873, by PEIRCE, J.—The bill filed in this case is to restrain the defendant from erecting and constructing twenty two-story dwellings with Mansard roofs on the east side of Sixty-third street, between Arch and Race streets, in the Twenty-fourth ward, until he shall take out permits for the same, according to the act to provide for the regulation and inspection of buildings in the city of Philadelphia.

The following statement of facts relative to the character of the location where defendant's said houses are erected, is agreed upon by the counsel for plaintiff and defendant.

That Sixty-third street between Arch and Race streets, where defendant's twenty houses are erected, is opened, but is not paved or curbed, and has no water, sewer, or gas pipes laid.

That Arch, Race, Sixty-third street, and all the principal streets, cor-

responding to those in the densely built-up portions of the Twenty-fourth ward, are plotted upon the confirmed city plan.

That this locality, viz., Sixty-third and Race streets, is three squares south, and three squares east, of that part of the closely built-up portion of the city known as Haddington.

That land around and near to the property in question, is not known as farms, but is sometimes tilled, and is generally sold by the acre, while in many instances it is divided up into building lots. Thayer's property was tillable at the time of the sale of the land to defendant.

That one Caspar Butcher has nearly completed forty-six two-story dwelling-houses in the immediate neighborhood of this property, viz., fourteen on the west side of Sixty-second street between Race and Vine streets, fourteen on the east side of Sixty-second and a-half street between Race and Vine streets, ten on the north side of Race street between Sixty-second and Sixty-second and a-half streets, eight on the south side of Vine street between Sixty-second and Sixty-second and a-half streets, and that beside the said houses of defendant, and of said Butcher, there are also six brick houses, two-story, with French roofs, erected on a lot on the east side of Sixty-third street between Vine and Callowhill streets.

That defendant's property was assessed when he bought it to build upon as *rural*, not as city or farm land.

For certain municipal purposes, such as taxation and building purposes, Philadelphia is classified as city, rural, and agricultural.

By the building inspection act of May 7, 1855, the rural portions of the city are excluded from the operation of the act. And the question raised by the pleadings and agreement of facts in this is, whether or not the defendant's buildings are within the provisions of the act.

The word "rural" is from the Latin word *rus*, *ruralis*, meaning the country as distinguished from the city or a town. But as great cities frequently rapidly extend themselves into the country, that which was previously rural or agricultural suddenly becomes city. Thus, seventy-two houses, enough in themselves to make a town, are being built in this immediate neighborhood; and these not isolated houses; but in rows, as city houses are built. The express object of the act was to secure the erection of buildings in a manner adapted for the security thereof against fires, and the safety of the occupants. Several of the provisions of the act are specially adapted to secure protection from fire; one of which is to require that the division walls, when more than two houses are built together, shall be at least the height of ten inches above the line of the roof of such house or building; such party or division wall to be covered by stone or metal, so as effectually to prevent the connection of the wooden cornice of the houses or buildings. Such being the object of the act, these houses are clearly within its provisions. It would be a very loose reading of the act, to hold that seventy-two houses in the same neighborhood, built in rows, as city houses are built, and but three squares south and east of the closely built-up portion of the city known as Haddington, were rural, and not within the provisions of the act.

But it has been urged, that as the streets on which these houses are erected are not paved or curbed, and have no water, sewer or gas pipes

laid; and that as the act of February 2, 1854, relating to taxation, defines such property as rural, that therefore, such properties are rural within the meaning of the building inspection act. The reason of the law is the life of the law. Each law must be construed so as to give effect to the object to be accomplished. The building inspection law was enacted to ensure safety to buildings and their occupants. Whenever buildings are so numerous and compactly built as to give to the neighborhood the character of a built-up portion of the city, they are within the spirit and letter of the law. But when houses, though compactly built, are without the adjuncts of paving, curbing, water, sewerage and gas, objects for which taxation exists, there is reason for exempting them from full taxation, and for that purpose they are classed as rural, within the meaning of the tax laws. The word "rural" in each statute must be construed according to the well-established rule of construction, that a statute must be interpreted according to the context, subject matter, and reason and spirit of the law, and so construed, these two statutes exhibit the word "rural" as used in a different sense in each.

The demurrer is sustained.

W. P. Messick, Esq., for demurrer.

W. L. Bladen, Esq., contra.

[Leg. Int., Vol. 30, p. 116.]

In the matter of PERRY'S COURT.

The act of 1855 requires that all new buildings fronting on a court of less width than twenty feet shall recede so that the court shall be of that width; this act is constitutional, and the owner is entitled to compensation.

Motion to vacate the appointment of jurors. Opinion delivered April 5, 1873, by

ALLISON, P. J.—The petition for the assessment of damages was presented by William Bardsley, who states that he is the owner of a lot of ground on the north side of South street, 150 feet east from Thirteenth street, having a front on South street of forty-eight feet, and extending in depth north fifty-one feet, and bounded on the west side by Perry's court, which is twelve feet in width. The petitioner asserts, that he has erected buildings on said lots, fronting on South street, and that the building inspectors compelled him to recede with his buildings four feet from the former west line of Perry's court.

A jury was appointed to assess the damages, which he would sustain in consequence of his being required to give to the widening of Perry's court, his ground, four feet in width by fifty-one feet in depth.

This motion to vacate the appointment of the jury is based on the following reasons:

1st. Perry's court is a private court, and that petitioner was not bound to recede from its line in erecting buildings on his lot bounded by said court.

2d. The petitioner does not aver that the buildings which he has erected front on Perry's court, but on Sixth street, and that this is a correct statement of the case as it actually exists.

And thirdly, that no damages can be lawfully claimed, because the petitioner bought with a full knowledge of the law, and with the intention of building.

The petition is filed under the first section of the act of April 21, 1855, P. L. 265, which recites, that no new dwelling-house, or other building in Philadelphia, shall front on any street, alley or court, which shall be of a less width than twenty feet; or without being made to recede, so that such street, alley or court shall be of that width.

The true intent and meaning of this law is free from difficulty. Its object was to protect the lives and the health, as well as to promote the comfort of the inhabitants of the city; a liberal view should therefore be taken of its several provisions in furtherance of the important results which it was clearly intended to advance. More especially is it to be regarded as designed to protect that class of our inhabitants who live in courts and alleys, who must seek a home for themselves and for their families in locations near to the place of their employment, and to find small tenements in the built-up portions of the city where property is valuable, and where economy in ground and cost of building are essential considerations for the landlord as well as for the tenant. In legislating upon this subject, of providing homes for those who are in moderate circumstances, no one could shut his eyes to the fact, that it is a question between small, separate tenements, with low rents, and large tenement houses, which will accommodate a number of families. In Philadelphia we have from the beginning, followed the former policy, and the early and later legislation for this city shows how constantly it has been adhered to.

In 1782, all streets, lanes and alleys, which had been laid out, were declared public highways. In 1805, streets, alleys, *courts* and lanes, were made public, if twenty feet in width. In 1819, streets, roads, lanes and alleys, of Northern Liberties, of twelve feet width, then open, were declared public. In 1830, the commissioners of Spring Garden were required to take charge of streets, lanes and alleys, twenty feet in width. In 1834, it was declared that no street, road, lane, *court* or alley should be laid out in Moyamensing by the public, or by individuals, of a less width than twenty feet. There was legislation on this subject for Kensington in 1820; for Penn District and for Richmond in 1847, and for West Philadelphia in 1852. This series of local enactments shows that the subject was kept steadily in view, and is in full accord with the act of 1855, and that the constant care of the Legislature has been to so regulate all openings upon which it was designed to erect dwelling-houses, that regard should be had for convenient passage-way, and for such enjoyment of light and air, as the minimum width of the opening would allow. This is further indicated by the additional requirement of the act of 1855, wherein it is directed, that no new dwelling-house shall front on any street, alley or *court*, of a less width than twenty feet, and shall have an open space attached to it in the rear, or on the side, equal to twelve feet square.

These several acts of assembly are referred to, not for the purpose of showing that all courts or alleys are to be regarded as public highways, but that influenced by the highest considerations of public policy, the Legislature have steadily intervened to protect in this respect, the health

of a large class of our citizens, who are compelled to reside upon crowded and narrow streets or passage-ways, and that in thus legislating, regard has also been had to the health, the comfort, and the morals of the general body of the people. Such intervention of the Legislature cannot justly be regarded as an unauthorized exercise of power; the use of private property is to a great extent under their control; the enjoyment of the citizen of his individual possessions, must, at all times, be in subjection to the good of his neighbor, and of the community of which he is a member. It would be a vain labor to attempt to prove this proposition, which has its numerous illustrations upon our statute book; but the legislation regulating party-walls and fences; the appointment of inspectors of buildings; the entire control of the thickness of walls; the removal of unsafe buildings, etc., is directly in point, and analogous in principle to the act of 1855.

We regard the law, therefore, under which the building inspectors required the petitioner to recede four feet from the line of Perry's court in the erection of his buildings, as applicable to the case before us; and that, whether this be regarded as a private way, it never having been dedicated to, or taken for common use, or as a public, or *quasi* public, open space or court, it is included within the provisions of the act of 1855, and that for the property, which the petitioner was thus required to give up to the use of the public, he is entitled to be compensated.

In the case of *Schultz vs. Doak*, 4 Phila. Reps. 151, we held, that a court-way, or open space, in front of tenements erected in the rear of a front building, was a court or alley, and was within the act of 1855, and if within the act, it is, of course, subject to its several provisions.

In the case of the *City vs. Michener*, decided April 20, 1869, it was also ruled, that a building erected on the corner of Arch street and Chancery lane, had a front on both streets, and that any other construction would defeat the evident intent of the law, to secure a width of twenty feet on all highways then existing, and of twenty-five feet for all streets, courts or alleys thereafter to be laid out. We think this case was well decided, and therefore adhere to the construction there given to the act of 1855.

This disposes of the first two points on which the present motion rests.

The third assignment of cause is not, we think, well taken. The fact that the petitioner bought his lot of ground with knowledge, actual or implied, of the law, which required him to build four feet within his line of property on Perry's court, amounted to no more than notice, not to erect buildings upon the strip fronting on the court or passage-way. This cannot, however, deprive him of his claim to be compensated for the value of the land, of the use of which the law deprives him.

The motion to dismiss the petition and discharge the jury is refused.

E. Spencer Miller, Esq., for rule.

William H. Yerkes, Esq., contra.

[Leg. Int., Vol. 30, p. 116.]

THE CITY OF PHILADELPHIA *vs.* JOHN H. MICHENER.

A building erected upon a corner lot **FRONTS UPON** both streets or alleys on which it bounds, within the meaning of the act of April 21, 1855, and the streets or alleys must be twenty feet wide.

Opinion delivered *April 24, 1869*, by

BREWSTER, J.—This is a motion for special injunction. The bill charges that the defendant is the owner of a lot at the southeast corner of Arch street and Chancery lane, thirty-three feet front on Arch street, by ninety-one feet six inches in depth on Chancery lane, which lane is eighteen feet wide, and runs south to Coombe's alley. That the defendant is about to erect a large storehouse on said lot, and intends building the same thirty-three feet front on Arch street, and of that width along Chancery lane eighty feet, the effect of which will be that the lane will be left only eighteen feet wide. The bill then recites the act of April 21, 1855, by which, as the plaintiffs contend, the defendant is required to recede from the line of said lane, one foot. It is charged that the defendant, although notified to this effect, insists that he is not within the terms of said act, and is proceeding with the said building, to restrain the erection of which, as proposed, an injunction is prayed.

The defendant has filed an answer admitting the facts charged, but denying that the proposed building is within the meaning of the law referred to. He contends that his building will *front only* on Arch street; that its front is to be of iron on the first story, and pressed brick above, with an iron cornice. The door on Arch street is to be what is known as a "return door," which will open about nine and a half feet on Chancery lane. There is to be no other door or entrance from Chancery lane, except a door five feet wide and nine feet high, forty-nine feet from Arch street. The answer further describes the appearance the building will present on Chancery lane, and concludes with the submission of the point that there is no front on the lane, and that the building is not within the meaning of the act.

The words we are called upon to construe by these pleadings are to be found in the sixth section of the act of April 21, 1855. P. L. 265, Br. Dig. 779, § 4.

It provides that,

"No dwelling-house or other building . . . shall *front upon* any street, alley or court, which shall be of less width than twenty feet, or without being made to recede so that such street, alley or court, shall be of that width, the buildings on either side equally receding; the damages for which widening shall be assessed and paid to the owners, . . . and no building of any kind shall be permitted to be erected on any street, court or alley hereafter to be laid out . . . of a less width than twenty-five feet."

It must be very clear, that if we are to construe the word "*front*" literally, the plaintiff has no case, for it can only be applied to the *face* of the house. Such is the definition of the word as given by Worcester, by Johnson, and Walker, and other lexicographers. They cite from standard authors, and their reference to Bacon. "The fore part of anything, as of a *building*," is directly to this point.

The derivation of the word from *frons* would be equally conclusive. But unfortunately for the defendant, the act does not say that the face of every new dwelling or other building shall be a street of not less than twenty feet in width. It declares that the new building shall not "*front upon*" any street of less than the prescribed width. And when we turn to the definition of the verb here used, we find that it means "to stand opposed or *over against* any place or thing." In this sense, a building bounded by two or more thoroughfares may be said to front upon each passage way. All large establishments occupying corner lots—using two streets for entrance, light and ventilation—may justly be described as "*facing upon*" each avenue.

The defendant's building will have a "return door," opening about nine-and-a-half feet on Chancery lane; another door forty-nine feet in the rear, and several windows, all on the same highway.

It would, therefore, seem that the structure about to be erected will "*front upon*" Chancery lane as well as upon Arch street.

Were it, however, otherwise as to the location of these doors and windows on Chancery lane, and were that front a blank wall, it would still seem that this case was within the spirit of the act of 1855.

Its plain intent and meaning were to secure a width of twenty feet for all highways then existing, and of twenty-five feet for all streets thereafter to be laid out. To accomplish this purpose, and thus to beautify the city, and to secure the health of its inhabitants, the law provides for the receding of every new building, and secures compensation to the owner.

This would seem to provide for a plan easy of comprehension and just in its operation.

But if a builder upon every corner lot can say my house fronts upon the principal street, and I will leave the highway at the side, precisely of its present width, the wise and healthful purposes of the statute will be at the mercy of every citizen who prizes his ground above the public right to take it upon compensation. It follows from this statement of the object of the law, that even were the construction of this statute a matter of doubt or difficulty, it would yet be our duty to interpret the words in controversy with reference to the public interest.

The fourth resolution of the Barons of the Exchequer in Heydon's case, declares it to be "the duty of the judges, at all times, to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*." 3 Rep. 7; Dwaris on Stat. 694.

Accordingly we find that the New River Water act was held to extend to places adjacent to London, although that city was alone mentioned in the statute—the reason given, being the familiar canon of construction, that "all statutes made for the convenience of the public ought to have a liberal construction, to be expounded largely and not with restrictions." Dwaris, 722. This is what Lord Coke called the *benedicta ex positio*, and by its requirement the construction of the act of 1855 must be adverse to the defendant's position.

Injunction granted.

George Junkin, Esq., for motion.

Charles H. Gross and Thomas J. Barger, Esqs., for city.

[Leg. Int., Vol. 30, p. 124.]

BROWN *et al.* vs. THE FAIRMOUNT GOLD AND SILVER MINING COMPANY *et al.*

1. Substantive alterations of a charter should be assented to by the body who compose the corporation, and where that body is the stockholders, the directors or trustees have no power to accept or reject such alterations.
2. There must be a regular acceptance of the alterations of a charter before they can bind the members.
3. The Legislature cannot alter a charter so as to impair the terms of the contract between the members and the corporation.

Motion for an injunction. Opinion delivered *April 5, 1873*, by

ALLISON, P. J.—The corporation defendant was created by an act of the Legislature of Pennsylvania, approved May 1, 1866, and by the same authority, a supplement to the charter was passed the 5th of February, 1873.

This supplement declares, that the board of directors, at any stated or other meeting called for the purpose, shall have authority to assess from time to time at their discretion, on the stock then issued, or thereafter to be issued, such sum or sums of money as they may think necessary, to pay existing liabilities of the company, and to carry on its business; notice of such assessment is required to be given in two newspapers, published in Philadelphia, once a week for three weeks.

It states further, that the board shall have power to sell such shares at public sale, for non-payment of assessment, after ten days' notice. And notice of the sale is to be published once in two papers, at least five days previous to the time fixed for the sale.

The supplement has never been submitted to the stockholders for acceptance or rejection, but was, according to paragraph 10 of the answer, accepted by the board of directors for the company; under the charter, defendants claim to possess this power.

This presents one of the vital questions which are raised by the bill and answer. The case of the *Commonwealth vs. Cullen*, 1 Harris, 133, seems to settle the law in our State, conclusively against this position in which the defendants justify their action. The principle is broadly affirmed, that substantive alterations of a charter, without request or assent of a corporation, are unauthorized interferences with the franchises, and that such assent must be given by the body who compose the corporation, and where that body is the stockholders, the directors or trustees have no power to accept or reject such alterations.

It therefore follows, that to make valid, as the act of the corporation, an act altering a charter, it should be passed at a meeting of the incorporators, duly convened for that purpose, after notice to all the members. The most ample opportunity should be afforded for deliberation upon the proposed alteration, nor can a minority be deprived of this right by the arbitrary will of the majority.

This fundamental right of the stockholders was totally ignored by the directors; the amendment was procured without previous notice to, or consultation with the body of the incorporators, and it is charged in the bill, and is not denied in the answer, that the supplement was obtained without the consent, or even the knowledge of the large

majority of the stockholders. The statement in the answer upon this point, is not responsive to this charge; it is not pretended that that previous approval was had, but only that it is acceptable, now acceptable to and desired by a large majority of the holders of shares, and to the holders of a majority of the shares. How this has been ascertained, is not stated, nor is there proof of its correctness. But though it be true, what becomes of the right of consultation of the assembled body, after notice, and time and opportunity for deliberation? The answer in this case is, that the board of directors have chosen to wholly ignore it, and to assume to themselves the exercise of this important prerogative, without the color of law even to sustain them. The charter will be explored in vain, for evidence of any such power; Article 3, in all of its six sections, contains nothing from which it may be inferred; and certainly there can be found no express grant of the kind. The duties and powers are those of ordinary management and control, nothing more.

The charter makes provision for the annual meetings of the stockholders. Special meetings are to be called by the board of their own motion, or on written request of stockholders, representing one-third of the capital stock of the company. The entire charter shows that the power to pass on important questions is reserved to the corporators, and it is declared that the business of the company shall be conducted and managed by a board of seven directors. But the acceptance of a material alteration of the charter, can in no proper sense be covered by the power to conduct and manage the business of the corporation. Yet such is the claim set up in the answer, which has not even a shadow of right in which to plant itself, and in no case could its exercise be justified, except where there was a clear power given by the charter, or where, as in the case of *St. Mary's Church*, 6 S. & R. 498, a select few, representing all those interested in the objects of the association, are created into and vested with all the powers of a corporation. In such case they constitute of themselves the corporate body, and therefore wield the whole corporate authority, and are of necessity competent to apply for and accept changes in their organic law.

It was also claimed, that though the charter contains no grant of power, such as has been sought to be exercised in this case, by the directors, yet having exercised it for the benefit of the company, it is binding on those for whom they acted. But before such a principle can be successfully invoked, it must be shown that there has been acquiescence or assent, by those who are to be affected. This cannot be claimed to be the case here, for as soon as the plaintiffs obtained knowledge of the existence of the supplement to the charter, and the attempt to levy assessments under it, they at once filed their bill, praying an injunction to restrain the directors from exercising any authority, by virtue of its supposed grant of power.

Upon the general doctrine of acceptance of a charter, whether it be as to an original grant, or as addition thereto, the decisions are clear, that there must be an acceptance of the chartered rights and obligations before they can bind the members of the body. When granted to persons who have not solicited it, it is said to be in *feri*, until after acceptance, and acceptance cannot be thrust on the members, nor will it

ever be presumed, unless it be from open and plain recognition of the grant, or from a continual exercise of the corporate power. This doctrine is broadly stated in *Commonwealth vs. Cullen*; and also in the case of *Shorts vs. Unangst*, 3 W. & S. 55. Nor will the carrying a charter round among the members privately, procuring their signatures, without meeting or notice, constitute the assent of the society, nor bind any who are not parties to it: *Swedes Church, Kingsessing*; King, P. J., Bright. Sup. 1849, page 125. Upon this point are also Angell & Ames, 52, and *Dartmouth College vs. Woodward*, 4 Wheaton. There is not a pretence in this case that the essential formalities have been complied with. Nor is there any fact from which it can be inferred, that they have been waived by the plaintiffs, or that the supplement, either directly or indirectly, has been accepted by them, which makes their right to the injunction for which they pray clear.

But the bill charges that the supplement is in violation of the Constitution of the State, in that it is a law impairing the obligation of contracts; this is denied by the answer, and we are requested by the parties to pass on this question.

The charter fixes the number of the shares at 20,000, and the value of each share at \$10. Only 8,200 of the shares have been sold, the balance remaining under the control of the board for which certificates have not been issued.

The plaintiffs do not aver in what way they became owners of their stock, whether as original subscribers, or by purchase from stockholders, but they aver, that it is all paid up, and that defendants received the full par value, for each and every share that was issued. This, they contend, is a full compliance with their agreement with the company regarding the subscriptions for stock in the nature of a contract with the corporation, they hold it to be beyond the power of the Legislature, to change the terms of the agreement, by which, after a full compliance with the obligations under which they placed themselves, they can now be compelled to pay another price for their stock, and that price, by the terms of the supplement, is without limit, the directors having authority to assess it with such sums of money as they may think proper and necessary to pay liabilities, and to carry on the business of the company. In the case of the *Commonwealth vs. Cullen*, Judge Bell says, substantive alterations of the charter of an insurance company, are not to be taken as parcel of a private charter without the previous concurrence of the corporators, manifested in some way recognized by law. Unless so sanctioned they are esteemed as unauthorized interferences with a solemn compact between the public and the individuals composing the corporation, and therefore obnoxious to the constitutional prohibition touching the obligation of contracts. This is the broad doctrine of the *Dartmouth College Case*, in 4 Wheaton. In *Brown vs. Hummell*, the court held that trustees elected under the provisions of a will and an act of incorporation had vested rights, under the act, and that a subsequent act, divesting them of their privileges and franchises, was unconstitutional and void, because it impaired the solemn contract of the State, as contained in their original charter. Judge Coulter says, being a contract on the part of the State, it was beyond the reach and control of subsequent legislatures. If this principle applies to a purely

religious and eleemosynary corporation, how much more clear is it that it governs chartered contracts, where the purpose is pecuniary merely, and where there is an undoubted agreement for the payment of money for a specified consideration.

A subscription for stock in a joint stock incorporated company, is a contract, and the interest thereby acquired is a good consideration to support an action, for the amount subscribed, against the subscriber: *Wordsworth on Joint Stock Co.*, 317; *Baltimore Turnpike Co. vs. Barnes*, 6 Harr. & Johns. 57; *Manufacturing Co. vs. Davis*, 14 Johns. (N. Y.) 238; and in our State are the cases of *Ogle vs. The Turnpike Road Co.*, 13 S. & R. 256, and *Commonwealth vs. Gill*, 3 Whart. 228.

So strictly is a subscriber for stock held to his contract with the corporation, that he will not be permitted to withdraw and abandon his shares without the consent of the corporation, unless expressly empowered to do so by the act of incorporation: *Turnpike Co. vs. Imlay*, 1 Southard, 285, and *U. Society vs. Bank*, 7 Conn. 456.

In the original charter of this company there is no power of assessment of shares of stock, or of sale after forfeiture, and the principle is well settled, that the extent of the liability of a party to pay assessments, is to be measured by the extent of his engagements: *Angell & Ames*, 493. It is a corollary of this proposition that where there is no engagement there is no obligation to pay assessments. At page 489 of *Angell & Ames*, the doctrine is thus stated: A corporation has no power to assess the shares of a member unless such power has been conferred by the charter, or unless the members have obligated themselves, by some act or promise on their part, to pay assessments.

Without spending more time on this part of the case, we think the objection taken to the right of the Legislature to alter the terms of the contract between the members and the corporation, is well taken; that it is, an attempt to make a new contract as to the price, which the plaintiffs who object, agreed to pay for their stock, and that it so impairs the obligation of the contract, that it falls within the constitutional prohibition.

The injunction as prayed for is granted.

Thomas J. Ashton, Esq., for plaintiffs.

J. Hanson and *E. Hunn Hanson*, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 140.]

BEATTY *et al.* vs. HENRY *et al.*

A person who holds the legal title to church property and claiming that the church is indebted to him, but his claim not being substantiated, will be compelled to convey the property to the equitable owner and pay the costs of the proceedings.

In equity. Opinion delivered April 26, 1873, by

ALLISON, P. J.—The defendants are the trustees of the legal title of the lot of ground and church mentioned in the bill filed, which was conveyed to them by Jacob P. Jones, assignee in trust for the estate of David Disberry, by deed dated the 3d day of July, 1845. The association for whose benefit the property was conveyed to the trustees, was in 1847 incorporated under the name of the African Methodist Episcopal Mount Pisgah Church. The plaintiffs ask that the defendants may be

ordered to make and execute a conveyance of the said lot of ground and church building, so as to vest the legal title to the same in the corporation.

The right to the decree prayed for is clear, unless good and equitable cause be shown to the contrary.

All the defendants, with the exception of Curtis Kane, are willing to join in the conveyance to the corporation; he is resisting the application upon legal ground set forth in his demurrer, which was abandoned on the argument, and pleads to the relief prayed for in the bill, that the association, prior to the 4th day of May, 1846, was indebted to John Henry in the sum of \$132.87½, for moneys borrowed, paid, and advanced, by him, for the use of the association, at the request of the trustees, which sum remains due and unpaid, and that he, Curtis Kane, has become the owner of said claim by purchase. He denies his obligation to make conveyance of said property to the plaintiffs, until they shall first have paid to him \$132.87½, with interest, from May 4, 1846.

Testimony has been taken at considerable length, from which the following facts are made to appear.

Kane, with four other persons, of whom John Henry was one, constituted the original board of trustees, and for a time, held possession of the property for the association. That a controversy grew up between certain members of the congregation and the trustees, by which they lost the possession of the land, and subsequently other trustees were elected in their place.

The property, before this, had been conveyed to the defendants in trust; demand was from time to time made upon them for the transfer of the legal title to their successors in the trust, and to the corporation plaintiffs; this was resisted by John Henry, on the ground that the church was indebted to him, for boarding and supplies furnished to the minister in charge, and for several sums of money borrowed by him, as he alleged, for the use of the church, and under the authority of the trustees.

This claim of Henry was from the first denied and resisted by the church; they opposed the demand *in toto*; they asserted that Henry had collected money to pay the claim for supplies, and that if the money was borrowed as pretended, it was after the controversy arose between the trustee and the church, when defendants were out of possession, if not out of office; that it was for the purpose of paying the expenses of litigation with the church. This fact is established by the testimony, and the weight of the proofs is against the assertion, that the trustees authorized the money to be borrowed.

It further appears, that Henry brought suit before Alderman Simpson, to recover against the church his demand in part or in whole; that afterwards the parties agreed to refer the whole matter of the indebtedness of plaintiffs to the arbitration of Alderman Simpson; that they stipulated to abide by his award, and that it should be a full satisfaction of the claim when paid. The alderman found against the plaintiffs in a sum less than one hundred dollars; the testimony shows clearly that the full amount of the award was subsequently paid by the church. This payment the defendant Kane says was eighteen years since.

John Henry died about the time these proceedings were instituted,

and it does not appear that he ever made demand for any unpaid balance as due to him by the church.

The defendant, Kane, testifies, that he purchased this claim from the widow of John Henry, and exhibits a receipt for \$128, purporting to be signed by her, dated January 20, 1870, "in full for due bill;" it was admitted that there was no due bill, but Kane testifies, that it was for the unpaid balance of the claim of Henry's estate, against the church; this is unsupported by any other proof in the cause. There was no administration upon the estate of John Henry; the receipt is signed Ann Henry, not as widow, or as acting for herself and heirs of John Henry; there was, therefore, no legal transfer to Kane of this claim; if the estate was insolvent the family could make no legal disposition of it of any kind, except through an administrator, and the testimony shows that John Henry was a poor man, wanting to borrow money to supply his family with the necessities of life, food and clothing.

The claim, of whatever it consisted, had been, at the time of the purchase, outlawed three or four times over. It was, therefore, in law, a thoroughly dead claim. If it ever had a *bona fide* existence, at the time when Kane paid Ann Henry for it, there was no legal right to be purchased, and no legal authority to vest title in the purchaser. It seems to have been a speculation on the part of the resisting defendant, in which, if his statement is true, he invested his money, taking the risks, and at a time, when active measures had been, or were about to be taken to vest title to the property in the corporation. As it is clear, that he has no legal right upon which to stand, so it is equally clear, that there is no equity in his plea. It is contrary to equity to encourage the purchase of doubtful demands, which cannot be enforced at law, whose mere existence seems to be well challenged, and where the purpose seems to be, to hinder and embarrass a party in perfecting title to land, which ought to be vested in him. Upon every ground presented, the decree prayed for ought to be made.

The demurrers are overruled; the plea disallowed, and the prayer of the bill granted. The costs of this proceeding to be paid by the defendant, Curtis Kane.

Wm. H. Martin and Theodore H. Oelschlager, Esqs., for plaintiffs.

J. Cooke Longstreth, Esq., and Hon. Leonard Myers, for defendant.

[Leg. Int., Vol. 30, p. 148.]

RIDGE AVENUE PASSENGER RAILWAY COMPANY vs. THE CITY OF PHILADELPHIA, MAHLON DICKINSON, Chief Commissioner of Highways, and JAMES HOLGATE.

1. An injunction will not be granted to restrain the city from changing the grade of a street, upon the complaint of a passenger railway company, who had purchased the right of way over the street, formerly a turnpike, where ample remedy is given the company for the recovery of whatever damages may result to them by statutory proceedings.
2. The act of 1846, as to injunctions against public buildings, and the *Market Street Railway vs. Building Commissioners*, discussed.

Opinion delivered May 2, 1873, by

ALLISON, P. J.—The bill recites that under the act of the Legislature of Pennsylvania of the 30th of March, 1871, the Ridge Turnpike Com-

pany was incorporated with authority to construct a turnpike, twenty-four feet in breadth, with a rise or fall of not more than four degrees from a horizontal line. It is further stated, that the Ridge Avenue and Manayunk Passenger Railway Company was incorporated by the act of March 28, 1859, and by the terms of said act, were required before commencing to build their road, to purchase of the Ridge Avenue and the Manayunk Turnpike Company, the right of way over their respective turnpikes; that this was done; and that plaintiffs paid to the Ridge Turnpike Company \$15,000, for the right of way over their road.

The Ridge Avenue Turnpike Company afterwards, in the year 1871, granted their road and franchises to the city of Philadelphia, but as plaintiffs charge, subject to the rights and privileges granted to them, the said plaintiffs, by said company.

The injury complained against, is an attempt on the part of the city, to change the grade of the turnpike road, between Thirty-third street and South Laurel Hill Cemetery, by elevating said road to an increased height of six feet, thereby depressing the railway to that extent, below the new grade and level of the road, whereby plaintiffs charge, that irreparable injury will be done to them, and that defendants refuse to offer or make any compensation for such injury.

For the cause or ground of complaint set out in the bill, an injunction is asked, to restrain the further prosecution of the work, unless due compensation be made.

The defendants rest their opposition to the prayer for relief, on the act of April 8, 1846, which of late years, has so frequently been invoked, to prevent interference by injunction, with the erection and use of any public works, erected or in progress of erection, under the authority of an act of the Legislature, until questions of title and damages, shall be submitted to and finally decided by a common law court. In *Wolbert vs. The City*, 12 Wright, 440, the Supreme Court refused to restrain against the appropriation of a private way over land taken for a public park. Fairmount Park was held to be a public work, in progress of erection under the authority of an act of the Legislature. The law having provided for the ascertainment and payment of damages, either by agreement with the commissioners, or by petition in the Quarter Sessions, for a jury to assess damages, the constitutional right of the citizen to obtain compensation for property taken for Fairmount Park, was fully protected.

It had been settled that when private property is taken for the use of the public, it is not absolutely necessary, that compensation should be ascertained and paid before the property is appropriated, but it is sufficient, if the owner can obtain compensation without unreasonable delay: 1 Barr, 309. But, though the State cannot take the property of an individual without providing for payment, yet the mode and manner of making compensation is a legislative and not a judicial power: *Heston vs. Canal Commissioners*, Brightly's R. 183. Nor is it necessary that the act which authorizes the taking shall provide for payment; if it is provided for in any way, the law does not sin against the constitutional guarantee of the citizen. But, until such provision be made, and protection is secured, an injunction will be granted: *Bonaparte vs. Railroad*, 1 Bald. 209.

It is contended by the defendants, that the most ample remedy is given to the plaintiffs, for recovery of whatever damage may result to them, by change of the grade of Ridge road, if it can be shown that they are otherwise entitled to damages. The 27th section of the act of consolidation, providing that where alteration in the regulations of streets, results in damage to private property, compensation shall be made for the same, to be ascertained and paid by law, as in the case of damage for opening streets. If a statutory remedy has been provided, by which compensation can be secured for injury to the private property of the plaintiff, that remedy must be followed; equity cannot be invoked to enforce a right, that can at law be maintained; and it is a general rule, founded in reason and convenience, that every duty created by a statute, must be enforced specifically, by means, where there are any provided in the statute itself: 11 Casey, 152; 4 Casey, 9; 2 Pennsylvania R. 462. It is, therefore, clear, that upon principle, as well as by the directions of the act of 1846, the relief sought must be denied to the plaintiff, if the case is covered by the 27th section of the act of consolidation. We think that it is; that he has the right to follow the mode there indicated, of ascertaining the amount of his damages, taking the same course, as in the case of damages for opening streets. There is, therefore, a full legal remedy provided for injury done to the property of the plaintiffs by a change in the grade of Ridge avenue. And in this lies the difference between this case and that of the *Market Street R. W. Company vs. The Building Commission*, recently decided by this court. In the latter instance, the contract between the State and the company, is not only impaired by the law which gives to the commission, acting for the city, the authority to cut the railway in two, and take and occupy a part of the route and track of the road, but the difference consists also in the material fact, that the law in this case leaves the road and its franchises to the plaintiffs, nor does the injury done amount to a taking, forbidden by the constitution, and for change of grade, compensation under the law can be obtained. In the case of the *Market Street Company*, the law provides no mode for ascertaining, or the recovery of compensation for the destruction of the franchises of the corporation, which, with a strong hand, were taken from them, under the authority of an act of the Legislature. In our judgment, therefore, the act of April 8, 1846, is wholly misapplicable, because there is no way in which the question of title and damages for the destruction of the franchises of the *Market Street Company*, could first have been submitted to, and finally decided by a common law court; with this difficulty before us, we did not see our way clear to disregard the solemn guarantees of the constitution, or to give to the statute a forced construction, which takes from the citizen his only protection against power, claiming to be exercised under legislative sanction in the erection of public works. Every infringement of the law should be given to the defence of individual right in the enjoyment of private property, even in defiance of the State itself, when it claims to exercise its highest rights of sovereignty, unless such power is within the constitutional concession of the citizens of this commonwealth, and does not conflict with the still higher law, the Constitution of the United States.

The plaintiffs, however, make answer to the assertion, of a full remedy

at law, either general or special, that he has no such remedy, inasmuch as the Ridge road or avenue was not, in 1854, a street or highway, under the control of the city. This is true to the extent to which the Legislature gave to the turnpike company the right to construct and regulate the grade of their road, but for every purpose not necessary for the enjoyment of the privileges granted to the corporation, it remained a highway of the city, the company possessing no other right than a right to construct a turnpike upon it within fixed gradients, to charge toll, etc. Turnpike roads are public highways, and it is the franchise of the citizen, to use them free of every restriction, that is not explicitly imposed by the Legislature: Gibson, C. J., 2 Penna. 464. Ridge road is one of the old highways of the city, laid down on its confirmed plans, subject at all times to regulation by the proper authorities of the city, except in so far as rights of supervision and control had been given to the turnpike company. If this view is correct, Ridge road is within the letter of the 27th section of the consolidation act, and the act covered it at the date when it was passed, but in any event, the law is prospective in its operation; it affected the regulation of highways of the city then in force, and under city authority, as well as such streets as should thereafter be laid out or brought under corporate regulation. The city by purchase has become possessed of all the rights of the turnpike company over this portion of the road, and has therefore the same powers of regulation, that it can claim to possess over other highways. And by the 8th section of the charter of the Ridge Avenue and Manayunk Passenger Railway Company, to whose right and duties the plaintiff succeeded, approved March 29, 1859, it is required, that the company in constructing their road, shall conform to the grades now established, or *hereafter to be by law established* of the several streets and avenues traversed by said road, and be subject to all ordinances of the city theretofore passed, or thereafter to be passed relating to passenger railways. An ordinance of July 7, 1857, provides that passenger railway companies shall conform to the surveys, regulations and gradients then, or thereafter established by law, and before commencing work, shall give bond or obligation, to comply with the provisions of the ordinance, which was done by the Ridge Avenue and Manayunk Passenger Railway Company. This, we think, is conclusive upon the plaintiffs, it is a charter obligation that they will comply with all changes of grade; and there is the express agreement, accompanied by bond, that this shall be done. No subsequent legislation of which we have knowledge, releases the plaintiffs from these conditions of their charter and agreement with the city; the act of April 8, 1868, cited by the plaintiffs, cannot, we think, be construed as having this effect.

We do not agree with the plaintiffs, that the attempted change of grade is illegal, because the plan by which such change is to be effected, has not been confirmed by the court. The law makes the action of the surveyors as to plans made under the directions of the city councils, final and conclusive, unless an appeal is taken to the Court of Common Pleas.

The plaintiffs did not appeal, and are therefore concluded by the decision of the board of surveys; the question of grades is not an undetermined question; in all respects, the plan is an established plan, except in so far, as it relates to the question of widening the avenue between

Thirty-third and Huntingdon streets, upon the appeal of the heirs of Henry Duhring.

Nor do we think that the act of March 8, 1872, consolidating the Girard Avenue and the Ridge Avenue and Manayunk Passenger Railway Companies, which gives to the consolidated company the use of the railways of the old companies, as then laid out and constructed, changes the legal rights of the plaintiffs. This use is subject to all legal alterations in the bed or grade of the road.

Injunction dissolved.

Joseph A. Clay and H. G. Clay, Esqs., for railway company.

Charles H. T. Collis and R. N. Willson, Esqs., City Solicitors, for the city.

[Leg. Int., Vol. 30, p. 153.]

JOHN M. MARIS *et al.* vs. THE UNION PASSENGER RAILWAY COMPANY *et al.*

1. The power of the Legislature of the State over the streets of the city are so ample, that no matter what hardship may be imposed upon citizens owning or occupying property thereon, equity can give no relief.
2. The State having granted a right to lay rails on a street, to one corporation, cannot grant any right to another, which will interfere with that right first granted.
3. A grant of right to cross any "railways and railroads now or hereafter to be laid on Market street," does not give a right to cross a railroad now constructed.

Opinion delivered May 3, 1873, by

ALLISON, P. J.—The bill in this case is filed by a large number of persons, who state that they are citizens, tax-payers, and some of them owners and occupants, and all of them occupants, of premises situate either upon Market street or upon Front street, in the city of Philadelphia.

They pray that the Union Passenger Railroad Company may be restrained by injunction from constructing an extended line of their railway upon Market street, between Ninth street and Front street, and connecting the line of their proposed tracks by a loop at, and extending into, Front street.

The defendants propose to make such extension of their railway, under the authority of an act of the Legislature of this State, approved the 13th day of March, 1873, which, in its title and enacting clause, reads as follows:

"A further supplement to an act to incorporate the Union Passenger Railway Company of Philadelphia, approved April 8, 1864, authorizing said company to extend their railway into and to lay double tracks on Market street, from Front street to Ninth street, in the city of Philadelphia, to connect the new tracks with their present railway, to cross and to intersect other railways at grade, to connect their new tracks with their present track by a curve or curves, and to connect with other railways without the consent of the councils of said city."

Whereas, The interests of the public demand that no corporation should have the monopoly of carrying passengers over the streets of a city between points which require the advantages of competition.

SECTION 1. That in addition to the powers and franchises heretofore granted to the Union Passenger Railway Company of Philadelphia, the

said corporation shall have the following rights, privileges and franchises, to wit: To lay a double track of railway and railroad on Market street, in the city of Philadelphia, from any point or points west of the eastern curb of Front street to any point or points east of the western curb of Ninth street in said city, to connect both of said double tracks with the present railway of said corporation, now laid on Seventh street and on Ninth street in said city, to cross all railways and railroads now or hereafter to be laid on Market street, between Front street and Ninth street, at grade, and to intersect the same at grade, to run the cars of said corporation, and to carry passengers along and over the route hereby authorized, to remove the cobble stones and beds of highways as may be necessary for the laying of the tracks hereby authorized, to put in said tracks all necessary loops, curves, frogs and switches, to connect the two tracks hereby authorized to be laid with a curve or curves, and to do all other things needful and necessary for extending the present route and railway of said corporation from Ninth street to Front street on said Market street.

SECTION 2. The powers hereby granted may be exercised without the consent of the councils of the city of Philadelphia, and all laws and ordinances inconsistent herewith are hereby repealed.

The prayer for injunction rests on two grounds: First, that the act of March 13, 1873, contains more than one subject, and that the same is not clearly expressed in its title; and second, that the occupancy of Market street, between Ninth and Front streets, by two additional passenger railway tracks, will seriously impair the usefulness and convenience of the street for business and commercial purposes, and that it is not competent for the Legislature to authorize such abridgment of access to the premises of complainants.

We are of the opinion that the exception taken to the act for the cause first assigned is not well taken. The title professes to give authority, among the other powers enumerated, to connect with other railways; in the body of the act no such right is given, unless it be held to apply to the other railways of the defendants, on Seventh and Ninth streets; this power had already been recited in the title, and is given in the first section. But to the recital objected to is added the additional clause, "without the consent of the councils of the city." It may therefore be regarded as a repetition of the power of making connection with Seventh and Ninth streets railways, but with the added privilege of doing so independently of the consent of councils. It does not of necessity follow that the words "other railways" must be interpreted to mean railways that do not belong to the defendants. Such a meaning could be given to them, but we are to maintain the act if it can be done; and where two interpretations can be given, one for and the other against it, it is our duty to accept the one which will uphold the law rather than that upon which it is sought to be overthrown. But if the entire strength of the position of the complainants be conceded to them, we are not prepared to say that the objection ought to prevail.

The second ground upon which the prayer for relief by injunction rests is more clearly untenable than the first. In the case of the Philadelphia and Trenton Railroad Company, 6 Wharton, 25, the law was so clearly stated that it has remained unshaken by subsequent decision ever since.

In Pennsylvania, highways are the property of the people of the whole State, who may dispose of them, by their representatives, at their pleasure. Over them, Judge Gibson remarks, the State holds despotic sway; nor is there any difference between the streets of a municipality and common roads and highways. The public sovereignty over them is universal, where such sovereignty is not excluded by legislative grants; and though streets may be placed under corporate regulation, in certain respects, yet they are subject to the paramount authority of the Legislature in the regulation of their use, by carriage, rail cars, or other means of locomotion yet to be invented. Upon this broad and comprehensive doctrine, the court rests the denial of the claim of the individual citizen to compensation under the constitutional prohibition against taking private property for public use, for anything which falls short of an actual taking. Matters of annoyance and inconvenience are not within the constitutional interdict; they say it consists either in the obstruction of a right of passage, which is personal, or in a depreciation of the value of property, by decreasing the enjoyment of it, but no part of it is taken from the owner, and though the State usually compensated consequential damages, it is of favor, not of right. For such compensation the citizen must depend on the forecast and justice of the Legislature.

This is the established law of Pennsylvania, too firmly settled, we believe, ever to be shaken by judicial authority. What, then, becomes of the complainants' assignment of annoyance and partial deprivation of the enjoyment of their property for business purposes? We are compelled to say that it is no reason for granting the injunction for which they pray. It is a hardship which the law places upon them, and for which it affords no remedy; certainly none that a court of equity can grant in the manner in which it is here sought.

The Legislature having, therefore, absolute dominion over Market street, except as they had in part stripped themselves of it by previous grant to the Market Street Railway Company, the right of the defendants to lay their road upon the street, under their grant from the Legislature, cannot be questioned, provided it is done in such a way as not to interfere with the corporate franchises of the Market Street Company, with which the plaintiffs have no concern. We are, therefore, required to dissolve, and do hereby dissolve, the injunction granted at the instance of the plaintiffs.

[Leg. Int., Vol. 30, p. 154.]

THE MARKET STREET PASSENGER RAILWAY COMPANY vs. THE
UNION PASSENGER RAILWAY COMPANY.

Opinion delivered May 3, 1873, by

ALLISON, P. J.—The views briefly expressed in the foregoing opinion are in part applicable to the present case. There is, indeed, but one other material point upon which they differ; that relates to the alleged interference with the chartered rights of the plaintiffs. The ground of complaint under this head is, that defendants propose to lay their track upon and across the track of the plaintiffs. The affidavit of the surveyor shows that 178 feet of the track of the complainants' road will be traversed by the track of the defendants' road, each using their separate

track, including rails, frogs, etc., but this, it is charged, is to superimpose another road to the extent of 178 feet on the Market street railway; that no such power is expressly given by the act of 1873, and that, therefore, no such right has been attempted to be conferred, and if given, could only be exercised after making compensation.

A reference to the act shows that it is declared to be a right of the defendants to cross all railways and railroads, now or hereafter to be laid on Market street, between Ninth and Front streets, at grade, and to intersect the same at grade.

The plan submitted by the defendants, showing the track of the proposed extension of their road, has been approved by the board of surveyors, and it is there made to appear that the supposed crossings or intersecting of the railway of the plaintiffs by that of defendants, by curves and by obtuse angles, are seven in number. This we think cannot be done. First, because we do not interpret the right to cross and intersect other roads to mean a general and unlimited right to cross, but only such crossing as is absolutely necessary to enable the defendants to build the road on Market street. Now the plan shows that no such necessity exists; that there is room on each side of the plaintiffs' track for the tracks of the proposed road, and there is, therefore, no absolute need of interference with the roadway of the plaintiffs.

This, we take it, is not a question of convenience merely, but one of necessity. If a necessity be shown, and the right is clear, however great the hardship, the hardship must be endured. Nor can this claim of right to cross be at all likened to the crossing by other roads at the intersections of streets, or the use of the track by vehicles; for every corporation that accepts a grant to lay a railway in a street takes it with the clear, though it may be an implied, condition that it is to be subject to such use. By such a grant there is taken from the public only so much use of the highway as is necessary for the proper working of the road; every other privilege which belonged to the public remains unaffected by the grant. But in the second place, we are of the opinion that an express grant to one road to cross and recross another at pleasure, without necessity to justify it, is an infringement of the corporate franchises which the Legislature has no right to grant; nor is it conceded that a necessity will even justify it without making provision, in either case, for compensation for injury to such corporate franchises.

This doctrine was sustained by 5 Green, 72, *Jersey City Railroad vs. Jersey City Horse Railroad*, where the rails were continuously used for the business of the defendants. Here it is a continuous use of the bed of plaintiffs' road, and a continuous obstruction of the track. For the same general doctrine see also 32 Barber, 358; 45 Baker, 138. It is approved by Judge Redfield in his *Law of Railways*, vol. 1, page 541, sections 6, 13, 646. At page 638, he says, he had no doubt the company building the track must be regarded as having a property in it. Such tracks must be regarded in the nature of private property, and that it cannot in any proper sense be regarded as devoted by the makers to public use. And in *Grover vs. Powell*, 21 Stockton, 211, it was held that a partial destruction or diminution of the value of corporate franchises is a taking of private property.

The right in this case to cross seven times carries with it the right to

cross seventy times, whereby the value of the road of the plaintiffs, which they hold under contract with the State, would be to a great extent destroyed; for it will not be forgotten that the charter of the plaintiffs stands not alone in the doctrine recognized in the Dartmouth College case, that the grant, as a pure donation of corporate franchise accepted by the grantees, is a binding contract; there was a money consideration paid for it in the purchase of the omnibus line, under direction of the Legislature, and a further outlay of money, annually expended, for paving the streets upon which the railway is laid. But there is a third reason for restraining the defendants from building their road in the manner proposed; the act does not in terms even give the right to cross the tracks of the plaintiffs as it is now constructed. It reads, "railways and railroads now or hereafter to be laid on Market street."

This act must be read as it was passed, without punctuation and certainly without supplying words necessary to make clear the right claimed by the defendants. If it read, "now laid or hereafter to be laid," this point would not arise; but the punctuation and the word "laid" have been omitted, and it speaks, literally interpreted, of railroads and railways now to be laid or hereafter to be laid. This, probably, was not the intention of the draftsman of the act, but in a charter we look to the letter of the law alone. No grant of corporate power can be taken, unless it be by plain words or by necessary implication, especially where such power trenches on individual or corporate rights previously acquired. *Com. vs. Erie and N. E. Railroad Company*, 3 Casey, 351. Upon the question of the right to construct the loop at Front street we are with the defendants, but for the reasons assigned the injunction is continued.

Dissenting opinion delivered by

PAXSON, J.—When this case was before the court at a former hearing I dissented from the judgment of the majority for the reason that I regarded the question of the constitutionality of the law under which the defendants then proposed to lay down their track as involved in so much doubt as to render it my duty to sustain the law.

While I would not hesitate as a judge of the Common Pleas to declare an act of assembly unconstitutional in a clear case, it is, nevertheless, a power to be exercised with extreme caution. It is virtually setting aside the action of the two co-ordinate departments of the government. That action is, to a considerable extent, under the supervision and control of some of the most able and experienced lawyers of the State, not only in the judiciary committees of the two houses, but in the body of each house respectively. In addition to this, the executive submits all bills for approval to the law officer of the Commonwealth. The office of attorney-general has, for many years past, been filled by gentlemen of rare ability.

I mention these facts not as reasons why an act of assembly should not be declared unconstitutional in a case free from doubt, but to show that a subordinate court should not rashly lay its hand upon the work of the other departments of government. When an act of assembly comes to us with all the forms of law, every presumption is in its favor.

The burden of proof is upon those who allege its unconstitutionality. Every doubt must be resolved in favor of the act. Unless the case is entirely clear, a Court of Common Pleas may well sustain the law and remit the parties to the court of last resort, where questions of constitutional law more appropriately belong.

Nor have we any thing to do, in the consideration of questions of this nature, with the wisdom of the particular statute. Such arguments should be addressed to those who make the law, not to those who expound it. Were we to set aside an act of assembly in obedience to popular clamor, or because, in our judgment, it is unwise or improvident, we should be substituting the will of the judiciary for the will of the people. Such act would be judicial usurpation.

It is conceded that the act of assembly under which the defendants now propose to lay their tracks upon Market street is constitutional; and that they have a right to lay said tracks somewhere upon said street, including the right to lay a loop on Front street. The majority of the court, however, hold that the defendants have not the right to lay their tracks as indicated by the plan, for the reason that they cross the tracks of plaintiffs, at several intermediate points.

The right to cross at an intersection is admitted; but intermediate crossing without a necessity is denied. In order to properly understand what is conceded, and what denied, we must look at the facts. From Front street to Ninth street there are four places where the proposed Union track would cross the track of the Market street road. One occurs at Seventh street, another at Ninth street, and both are necessary to enable the Union line to connect with its other road on the streets referred to. I understand the right to do this is conceded. Indeed, it could not be denied without depriving the Union road of all right to lay its track with the connections referred to. In addition, the south track of the Union road crosses the south track of the Market street road once above Third street, and the north track of the Union road crosses the north track of the Market street road, above Eighth.

Both of these crossings are at an obtuse angle, and result from the fact that the track of the Market street road, at both these points, deflects from a straight line. I note no other crossing of the track upon the plan prepared by the city surveyor, and which is admitted to be the one by which defendants propose to build their road. There are other crossings referred to in plaintiffs' bill, but they are distinctly denied by defendants' affidavits, and are not sustained by proof.

It will be seen that the question comes down to the single point, whether the Union company have the right to cross the tracks of the Market street road once between Front street and Ninth street. The act of assembly says the defendants may so construct their road. The majority of the court say they have no such right. I would not override an act of assembly in this summary way, upon a motion for a special injunction, unless the case was perfectly free from doubt, and the necessity for an injunction overwhelming.

It is held by the majority of the court that the crossing referred to would be a destruction or violation of the corporate franchises of the plaintiffs. I am unable to see in what way it would so destroy said franchises. That it would introduce competition, and enable thousands

of persons crossing the river at Market street ferry to go up or down town, by way of Seventh or Ninth streets, by the payment of a single fare, and without change of cars, is apparent. That this would result in a diminution of plaintiffs' cash receipts is equally clear. While this would subject plaintiffs to loss, it is *damnum absque injuria*. The right of the Legislature to charter a rival road, and thus introduce competition, is too plain for argument. If it is contended that the said crossings would seriously impede the running of plaintiffs' cars at the points of intersection, it is sufficient to say that no such fact is averred in plaintiffs' bill, or sworn to in any affidavit that I have seen, while it is expressly denied by defendants' affidavits. If the special injunction rests upon this question of fact it has neither averment nor proof to sustain it.

No case can be found in which it has been held that the crossing of the track of one railroad by another road, in pursuance of an act of assembly authorizing it to be done, was *per se*, a destruction of corporate rights. In the case in 5 Green, cited by the majority of the court, the question was not whether one road might cross another, but whether the cars of one company could be run for several squares over the rails of the other. It is no answer to this to say that if the Legislature may authorize such crossing at one place, it may do so in a hundred places, and in such manner as to practically prevent the running of plaintiffs' cars. The question is not what the Legislature may do, but what it *has done*. If the crossing of plaintiffs' tracks in the manner indicated would not interfere with the running of their cars as heretofore, how can it be said to interfere with their franchises? And if said crossing does not so interfere with said franchises, ought we to enjoin the defendants because some other imaginary plan, which they do not purpose to adopt, might do so?

It does not follow that because the Legislature may authorize the crossing of a railway track in a manner that would cause no practical injury, it may also authorize such a crossing as would amount to a destruction of the franchises of a corporation.

There is a marked distinction between the rights of a city railway company in the use of its track, and a railway company whose road is operated by steam. In the latter case the company always purchases or pays for the right of way, and sometimes the soil itself. It has of necessity the *exclusive* use and possession of its road bed. Such railroad is not a public highway in the ordinary sense of the term. But our city railways have no such exclusive possession of our streets. They occupy them in common with our citizens generally. Their tracks may be used indiscriminately for either business or pleasure, subject only to the restrictions imposed by law.

Their tracks may be crossed by citizens with vehicles or otherwise, at any point, and the Legislature may, in my judgment, grant a corporation the right to do so with its cars, subject only to the restriction that such crossing shall not prevent existing roads from operating their cars. The claim which the plaintiffs set up to an exclusive use of the street is one which cannot be conceded without serious detriment to the public interests.

The crossing of the plaintiffs' track in the manner proposed seems to have been rendered necessary by the peculiar manner in which the

Market street road has been laid. This is apparent from an inspection of the plans. In his affidavit, Mr. Shedaker, city surveyor, says:

"The proposed tracks of the defendants, between Ninth street and Front street, as delineated on the map already exhibited to the court, were located by affiant, with a view to cause the West Philadelphia Company, and the merchants on Market street, and the public generally, the least possible inconvenience. And affiant saith, that as the West Philadelphia tracks are now laid, he knows of no method by which his original draft can be altered so as to effect the above purpose, unless the West Philadelphia Company will consent to an alteration in the lines of their tracks as now laid. Affiant firmly believes, as an expert, that the use of the Union tracks, as located on affiant's original plan, will not occasion the West Philadelphia Company any more inconvenience than the passage of carriages and other vehicles now occasion on said routes."

In view of these facts, which appear too self-evident to be contradicted, it would seem difficult to understand how the crossing complained of involves the destruction of the franchises of the Market Street Company; and from so much of the opinion of the majority as assert that it does, I respectfully dissent.

I have purposely avoided all reference to the merits of this controversy. I do not regard the claim of either company, to be conservators of the public good, as entitled to very much weight. I view it as a contest between rival companies, each having a warm regard for its own interests. The vindication of public rights may well be left to other hands. I would give to each company its legal rights; nothing more, nothing less.

The practical effect of this decision may be, if acquiesced in by the parties, or confirmed upon appeal, to have additional tracks laid down between plaintiffs' present tracks and the curb. Whether this result will be satisfactory to those most interested in this street remains to be seen. I regret the majority of the court, having reached the conclusion that they had a right to continue this injunction, did not exercise, if practicable, their equitable powers as chancellors to put the parties upon such terms as would have compelled them to come to some agreement by which the use of this noble highway should not be needlessly interfered with.

As the case now stands, with the right of the Union Company to lay its tracks on Market street established, I must be permitted to indulge the hope that wiser counsels may yet prevail, and some amicable arrangement made by which the cars of both companies may be accommodated without the laying of additional tracks.

I am glad to be able to say that this is the first occasion I have felt compelled to dissent in this formal manner from the judgment of the majority of the court. The minority is of course always wrong; but, with an anxious desire to be right in this matter, I am utterly unable to see my error.

Dissenting opinion delivered by

PEIRCE, J.—I do not concur in the decision of the majority of the court, and I do substantially concur in the dissenting opinion of Judge Paxson. It having been conceded that the defendants have the right to

lay their railway down Market street, it is their duty to lay it in the manner which will least interfere with the public use of the street; and this, I conceive, they propose to do by the plan prepared for them by the surveyor of the district. That this plan involves the necessity of crossing the plaintiffs' track is not the fault of the defendants, but of the curved manner in which the plaintiffs, from necessity at the time, or inclination, have laid their track. If the view of the majority of the court be correct, the plaintiffs could have obtained the exclusive use of the street by running their road from side to side in a zigzag course through the street. It does not become the plaintiffs, then, to complain that the defendants cross their track seven times. In my opinion they would have the right to cross it seventy times if the plaintiffs had laid their road in a manner which compelled them to the necessity of so doing. If there were a disposition on the part of the plaintiffs to consent to the straightening of their track, a plan could be agreed on in ten minutes which would end this controversy, and which, whilst securing to each company the franchise bestowed on it by the State, would least interfere with the public use of the street. And I think it is the duty of this court, sitting as a court of equity, and having supervision and control of these corporations, whilst securing to them the full and proper exercise of the franchises conferred on them by the Commonwealth, to see that they so lay their tracks as will least interfere with the use of the street as a common and public highway, and for the transaction of business on it by the merchants resident on it and others.

The only other plan left to the defendants to lay their tracks, unless the plaintiffs will consent or be required to straighten their road, is to lay them between the footwalks and the plaintiffs' tracks, which will bring the defendants' tracks so near to the curbs as to seriously interfere with the business of the merchants on the street lading and unlading their goods, and with the transit of the cars of the defendants along the highway.

I do not quite understand the criticism which is made on the language of the act giving power to cross all railways, that the "words now or hereafter to be laid on Market street" mean *now to be laid*, and do not mean *now laid* on Market street. The construction would imply that the Legislature meant to give a right to defendants to cross their own railway, which surely cannot be the meaning of it.

This is the first instance of a healthful rivalry in the interests of the public among the railway companies of our city, on whom the use of our streets has been so liberally conferred, and I think that the power of the court ought to be so used in the control of them as to favor and promote to the greatest degree the interests of the public, which in this case will be best done by requiring the plaintiffs to straighten their track, or in default thereof to permit the defendants to lay their road in the manner proposed by them.

William H. Rawle, Theodore Cuyler, George W. Biddle, and William M. Meredith, Esqs., for the plaintiffs.

Hon. James Thompson, Hon. F. Carroll Brewster, and Charles H. T. Collis, Esq., for defendants.

[Leg. Int., Vol. 30, p. 168.]

THE CITY OF PHILADELPHIA vs. GEORGE F. KEYSER.

1. If the answer of defendant cannot by act of assembly be admissible in evidence against him if he were charged with a misdemeanor, he will be compelled to answer complainant's bill.
2. The fact that defendant has given plaintiff a bond for the performance of his duty does not prevent plaintiff proceeding in equity against him.
3. The jurisdiction in equity having once rightfully attached, it can be made effectual for complete relief.

Opinion delivered *May 17, 1873*, by

ALLISON, P. J.—The defendant was register of water rents for the city of Philadelphia from February 28, 1867, to February 1, 1872. The plaintiff charges that, during all of this period, he neglected to pay in daily to the city treasury, as required by ordinance, all moneys received by him for water rents, and did not make daily returns, under oath, of all moneys so received to the controller of the city.

It is further charged, that during all the time he was in office, the defendant deposited the moneys of the city in his own name, with individuals and with certain banking institutions, and received interest upon the same, for his own use and benefit, and that he has never paid the said interest or profit to the city.

The plaintiff prays for discovery by defendant of the several matters charged against him, and that he be compelled to account for and pay over to the city all interest or profit on moneys received in violation of his obligation and duty of office which in any way accrued to him from detention and use of the moneys of the city.

There is also a prayer for general relief.

The defendant demurs generally to the bill, and specially to the prayers for discovery and relief.

The chief ground of demurrer is, that if compelled to make answer of the matters mentioned in the bill, the answers might be evidence tending to subject the defendant to punishment, penalties and disabilities, under the laws of Pennsylvania.

It is an elementary principle of equity jurisprudence that no man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture. He may refuse to answer not only the leading facts, but as to every incidental fact which may form a link in the chain of evidence, if any person should choose to indict him: *Adams' Equity*, section 3, and authorities cited in note. In *Story's Eq. Juris.*, sec. 1494, it is laid down, that discovery will not be enforced in aid of a criminal prosecution, or of a penal action, no one being compelled to accuse himself: *Wigram's Law of Discovery*, 82. It has also been held that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony: *8th Vesey*, 405. Same principle sustained by this court in *The Bank vs. Biddle*, 2 *Parsons*, 58. The protection thus afforded to a defendant, against being compelled to prove himself guilty of a criminal act, is subject to modification, in respect to frauds; but objection to discovery of a fraud will not hold, on the mere ground that it might be indictable; it is necessary that an indictment shall be actually pending, or, at all events, a reasonable probability that

one will be preferred: Adams, sec. 4, 8th Conn. 528; 3 Barb. Ch. R. 358. In *O'Connor vs. Tack et al.*, 2 Brew. 407, the majority of this court held that where a bill charged fraud, and the possession by defendants of memoranda relating to the transaction, and the defendants' answer denying the fraud, and referring to the memoranda, that they could not object to an order for their production, on the ground that an indictment was pending against them. Judge Ludlow dissented, and supported his dissent upon the general principle that no one can be compelled to criminate himself so as to subject him to prosecution, and that under Article IX., of the Constitution of this State, sec. 9, "no citizen can be compelled to give evidence against himself." He also held, that the 123d section of the act of the 31st of March, 1860, did not cover the case of the defendant. It is asserted by the defendant in this suit, that it is equally inapplicable to his case, as a protection to him; that the use of the moneys of the city by an officer of the corporation for his own personal gain, is made punishable by fine and imprisonment. The section referred to is as follows: "No such trustee, merchant, attorney, broker, agent, director, officer, or member, *as aforesaid*, shall be enabled or entitled to refuse to make a complete discovery, by answer, to any bill in equity, or to answer any question or interrogatory in any civil proceeding; in any court of law or equity. But no such answer to any such bill, question, or interrogatory, shall be admissible in evidence against such person charged with any such misdemeanors." An examination of the preceding sections to which the 123d section refers, will show that trustees are mentioned in 113; bankers, brokers, attorneys, merchants and agents, in section 114; and in the 116th section it is made an offence for an officer, director, or member of any bank, or *other body corporate*, or public company, to fraudulently take, convert, or apply to his own use, or to the use of any other person, any money, or other property of such bank, body corporate or company.

This, it seems to us, covers the case of defendant; he was an officer of the city of Philadelphia, and therefore an officer of a body corporate, and is within the letter of the clause of section 123, which requires answer to be made by an officer of a corporation, other than an officer of a bank. The 116th section, it will be seen, treats of the very subject matter mentioned in the bill, the fraudulent use and application of the moneys of a body corporate. The defendant is within the protection of the 123d section, and for this reason he cannot successfully plead the general principle, so well established, and which might otherwise enable him to avoid making the discovery sought to be reached by the bill.

It is further set out, as a ground of demurrer, that the plaintiff has a full, adequate and complete remedy at law for the alleged wrongs, and is therefore not entitled to the discovery and relief prayed for.

But this general principle has its qualifications, and to some extent its exceptions; there are cases in which the jurisdiction of courts of law and equity may be said to be concurrent. It has been successfully maintained in many instances that where a party has a just title to come into equity for discovery, and obtains it, the court will go on and give him the proper relief, and not turn him round to the expense and inconvenience of a double suit at law.

The jurisdiction having once rightfully attached, it can be made

effectual for the purposes of complete relief: Story's Eq., sec. 64. The court having acquired jurisdiction of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident and mistake: 1 Fonb. Eq., B. 1, chap. 1, sect. 3; Coop. Eq., introduction, page 31, and *Middletown Bank vs. Russ*, 3 Conn. 135. The exercise of this jurisdiction is rested in Fonblanque mainly on the ground of preventing multiplicity of suits. In *Aldey vs. Whitstable Company*, 17 Ves. 329, Lord Eldon says there is no mode of ascertaining what is due except by an account in a court of equity. But it is said the party may have discovery and then go to law. The answer to that is, that the right to the discovery carries with it the right to relief in equity. In *Ryle vs. Haggie*, 1 Jac. & Walk. 236, it is said, when it is admitted that a party comes properly into equity for discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for relief; and in *Mackenzie vs. Johnston*, 4 Madd. 373, Sir John Leech says, speaking of the case before him, the plaintiff can only learn from the discovery of the defendants, how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them if it turned out that they had abused his confidence, yet such must be the case if a bill for relief will not lie. There was here a cautious admission of the right to relief, in special cases, by Sir John Leech, founded on the right to discovery, as there was also by Vice-Chancellor Wigram, in *Pearce vs. Creswick*, 2 Hare, 293. But Judge Story remarks, at section 65, Equity Jurisprudence, that the guarded language used is "in most cases," although he says it is certainly difficult to perceive any solid ground why jurisdiction should not extend to all cases embraced by the general principle.

So also in cases of account there is a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. The several reasons upon which this principle is maintained are stated in Story's Equity, sect. 67: In inadequate remedy at law; discovery in most cases obtained only by reference to a master; compelling production of vouchers and documents, and suppressing multiplicity of suits.

We think the present case is clearly within the rule, upon the grounds of fraud and account, and is not affected by the fact of defendant having given an official bond to the city. A suit may be maintained without regard to the bond; for the claim of the plaintiff may far exceed the penalty of the bond. The demurrers are overruled and the defendant is directed to make answer to the bill.

Lewis C. Cassidy and *J. H. Heverin*, Esqs., for demurrer.

Robert N. Willson, Esq., contra.

[Leg. Int., Vol. 30, p. 200.]

KUNKLE vs. THE PHILADELPHIA RIFLE CLUB *et al.*

The facts of this case held to constitute a lease and not a mere personal license, which would end upon death of plaintiff's decedent.

In equity. Motion for special injunction. Opinion delivered June 14, 1873, by

ALLISON, P. J.—The question upon which the determination of this

motion depends, requires us to decide whether a certain agreement made between Louis Kunkle, on the 24th day of March, 1873, and the defendants, amounts to a lease of the premises, therein mentioned; or whether, as defendants contend, it is but a personal license to Louis Kunkle, ending with his life, and not passing as an estate. And this question is most readily answered by first ascertaining, what is necessary to create a lease or contract of letting of lands, so as to create between the contracting parties the relation of landlord and tenant.

A lease is a contract for the possession and profit of lands and tenements on the one side, and a recompense of rent or other income on the other: Bacon's Abridgment—Lease; or it is a conveyance of lands or tenements to a person for life, or for years, or at will, in consideration of a return of rent or other recompense: Cruise's Digest—Title, Lease. It is essential, therefore, to every valid agreement or contract of this character, that there must be a lessor able to grant the land, a lessee capable of accepting the grant, and a subject matter capable of being granted. Under such a contract, the lessee acquires a right to enjoy the premises mentioned in the lease, and to use them for the purpose agreed upon; and this imposes upon him the duty of fulfilling all the express or implied covenants of the lease, which vary according to the specialties of each agreement; but it is the ordinary incident of every lease, that the lessee shall pay a rent or consideration to the lessor for use of the premises granted, but it is immaterial whether the rent is paid in money or service, or in any stipulated article, such as grain or ore.

The technical words of a lease are to "demise, grant, and to farm let." But it has by a uniform course of decision, both in England and in this country, been held that whatever words are sufficient to explain the intent of the parties, that one shall divest himself of the possession, and the other come into it for a determinate time, whether they run in the form of a license, covenant or agreement, are sufficient, and will in contemplation of law, amount to a lease for years, as effectually as if the most formal and technical words had been made use of for that purpose. Some of these authorities may be cited: 4 Burr. 2209; 1 Mod. 14; 11 Mod. 42; 3 Burr. 1446; 2 Mod. 80; 3 McCord, 211; 3 Fairf. 478; 5 Rand., 571; 1 Root, 318. And in Pennsylvania are the cases found in 6 Watts, 362; 1 Wright, 193; 8 Barr, 272; 9 Barr, 18; 2 Harris, 287.

We turn now to the agreement of March 24, 1873, to see what its stipulations are.

Kunkle is to be permitted to occupy for the private use of himself and family, such rooms in the main building, and such piece of ground within the enclosed property of the club as the committee may designate, until March 31, 1876, the club reserving the right to make alterations, improvements and repairs, for a restaurant or otherwise. The second article contains a stipulation that Kunkle, in consideration of \$500 a year, payable quarterly to the club, *during said term*, shall enjoy privilege of sale of certain articles upon the premises. He also agrees to provide glasses, etc., light, fuel and servants; furnish at his expense music, and render the service of conducting the restaurant in a proper manner. He is to have the ten-pin alley, keep it with the grounds and buildings in good condition, and in default of his removing at the *expiration of his term*, the club reserve the right to take possession of the premises. And in the

event of Kunkle refusing to remove from and deliver up premises, he authorizes and empowers the prothonotary, or any attorney, to enter an *amicable action of ejectment for said premises*, and to confess judgment in favor of the defendants, and issue a writ of *habere facias possessionem* for the same.

Under this agreement, Kunkle entered into possession of a portion of the buildings and grounds of the club, and as the bill asserts, stocked the said apartments and saloons with furniture, merchandise and liquors of the value of upwards of \$3,000. He shortly after this died. His widow has taken out letters of administration upon his estate, which established her right to the lease, if the contract is in fact a lease, for the benefit of the estate: *Keating vs. Condon*, 18 P. F. S. 75; Nash. R. P. 410.

What relation does this agreement establish between Kunkle and the club, construing it not only according to its legal signification, but according to the evident understanding and meaning of the parties?

It is clear, in our judgment, that Kunkle by the terms of the written contract, became the tenant of defendants. We think that every element of the relation of landlord and tenant is established, by the undisputed facts of this case. We have a lessor in possession of lands under no disability as to the power to rent, or grant the same for a term of years to a tenant. We have a lessee capable of accepting the grant from the lessor. We have an actual agreement entered into between the parties for the premises in question, for a term of years, for a valuable consideration, which consists of the payment of a fixed sum of money at stated periods, as well as service and labor to be performed, and money to be expended as the consideration for the grant, and there is also the admitted fact, that under this agreement, Kunkle entered into possession of the property, and expended a large sum of money under the contract. It is difficult to understand what will establish the relation of landlord and tenant, if this case does not, when measured by a strict legal judgment of the elements upon which a decision must rest. But if we try to look into the heart of the case, in order to ascertain the true understanding of the parties, at the time the agreement was entered into, we think but one conclusion can be arrived at, and that is, that every fact presented in the cause, shows the clear intent to be, to create a tenancy which should run until the 31st of March, 1876, and the position now assumed by the defendants is contradicted by the powers which were reserved, to dispossess Kunkle upon the condition of a violation of the terms of the contract, or at the expiration of his term; not in the manner in which a mere contract of hiring of personal service is terminated, but in due form of law to obtain possession of lands, and by summary legal process. There is also in the agreement, the clear recognition of the fact that the premises were granted for a term. The payments were to be made quarterly during the term. Possession might be resumed on forfeiture of condition on which it rested, at the expiration of the term or otherwise. The premises were to be taken possession of, and an amicable action in ejectment was authorized.

We are at a loss to discover any fact which favors the theory, that this was but a personal license, which ended with the death of Kunkle. If the administratrix is not competent, as was argued by the defendants,

to keep the place properly, because she is a woman, the answer to this is, that if Louis Kunkle was tenant to the defendants, they took the risk of this inconvenience, and that what the administratrix may do by another, she in law will do by herself, and that the employment of male assistants will enable her, if personally incompetent, to do all that Louis Kunkle could do if still alive.

The Pennsylvania cases cited abundantly establish the true character of the agreement in question. It is not necessary to examine them upon these facts and the law as therein stated, and we rest this case by a mention of but one: *Mitchell vs. The Commonwealth*, 1 Wright, 192, which decides, that a written contract containing stipulations for holding the premises for three years, for keeping up machinery at the expense of the lessees, and for surrender at the termination of the contract, is a lease, and not a contract of bailment for hire, though it stipulated that the lessee should have the premises rent free. The compensation or rent was found in the agreement, that the tenant was to sell manufactured lumber to the owner or lessor at a stipulated price. The court say that a tenancy may be created and exist, where the agreement is that no rent shall be demanded or paid. The case before us is very like to that case in some respects, but much stronger upon the assumption, that this agreement constituted a lease, for here the rent was clearly reserved. For the reasons stated, the injunction heretofore granted is continued.

Hon. *James Thompson* and *Fred. Dittman*, Esq., for plaintiff.

D. W. Sellers and *C. D. Freeman*, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 200.]

COMMONWEALTH OF PENNSYLVANIA *ex relatione* ROBERT S. NICKERSON and JOHN H. SLOAN, vs. DAVID S. CONOVER.

The Court of Common Pleas has no authority to incorporate a club with the provision that each share shall be entitled to one vote.

The acts only authorize the court to confer such immunities as by the common law were necessary to constitute a corporation.

Quo warranto. Opinion delivered June 14, 1873, by

ALLISON, P. J.—The question presented by the pleadings is, whether a clause in a charter of the Vesper Yacht Club, incorporated by the Court of Common Pleas, is valid, which provided, that in elections for officers of the club, "each share shall represent one vote, and the owners of one or more shares shall be entitled to one vote for each share he may own."

Whatever rights the members of this corporation possess, they take as franchise derived from the State, by direct or indirect grant, and by them accepted. A corporation being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence; but this implies a right or authority to confer on individuals the special privileges or franchises set out in the charter, and it must always be a material question, where the grant is not held directly from the State itself, whether the franchises expressed in the charter are such as the tribunal conferring corporate powers has the right to confer. The stream can rise no higher than its source. The fountain from whence the waters flow, can give

forth no other elements than those with which the supreme power in the State has charged it. So that when we are required to pass upon the lawfulness of a grant of corporate right, which Courts of Common Pleas in the Commonwealth are authorized to dispense to associations of individuals, we look to the statute which clothes the courts with this attribute of sovereignty, as our guide, and our only guide. For if in taking its soundings, we find no power given to the court to invest individual citizens with any of the special privileges specified in the articles of association, then the grant must be regarded as a void grant, and it must be treated as if it had not been inserted in the charter. Have the Courts of Common Pleas the right to authorize a corporate stock vote, instead of the individual vote, of the members of the body?

It is an original and fundamental principle which lies at the foundation of all corporate existence, that special rights are conferred on the members of the body, to enable them to do in their collective capacity, as an artificial person, those things which do not belong to citizens of the country generally, by common right. This carries with it, of necessity, the doctrine of the equality of membership, for it is the agreement of individuals to associate together, and accept the grant of special corporate franchises, that as a rule, is essential to the creation of a corporation. An acceptance of a grant by the individual members, lawfully expressed, is absolutely required. We think it may with safety be assumed, that at common law, the rights of the members of a corporation stand upon the principle, that all are equal in the enjoyment of franchises granted, unless the contrary appears upon the face of the charter; that the contrary is never presumed; and that those who set up a claim to the exercise of privileges which do not of right belong to all the members, must show an indisputable title to the enjoyment of the power. This doctrine is clearly recognized in the case of the *St. Mary's Church of Philadelphia*, 7 S. & R. 538, which was a question of an amendment of the charter, in which the court say, although the charter does not provide for it, yet in the nature of things, it may be supposed, that all human institutions may in the course of time require alteration. And when the question of alteration comes on, there is no rule so convenient as to decide by a majority. *This is the rule of the common law applied to corporations.* The civil law requires two-thirds.

The club, of which the parties, plaintiff and defendant, are members, was incorporated under the act of March 26, 1847, P. L. 44, which extends the provisions of the act of October 14, 1840, to clubs for the advancement of athletic sports, barge and fishing clubs, etc. The act of 1840 is the general law, granting to the Courts of Common Pleas, power to incorporate citizens for charitable, literary and religious purposes, fire engine or hose companies, and beneficial societies. The court are required to examine the articles of association, and if the objects set forth appear lawful, and not injurious to the community, and no sufficient reason is shown to the contrary, to approve the same, and decree that the persons associated shall become a corporation and body politic in law. This act is in substance like to the act of April 6, 1791, which gave to the Supreme Court power to incorporate associations of individuals for literary, charitable and religious purposes, which was examined and construed by the court in the case of the *Medical College of Philadelphia*,

3 Wharton, 445. The syllabus of the case is, that the court will not certify under the act of 1791, to confer on certain associations the powers and immunities of corporations, where the constitution of the association confers powers not specified in that act. And that where the constitution of a medical college, submitted to the court, contained a clause authorizing the college to confer degrees in medicine upon students and others, the court declined certifying in favor of the application. The act received at the hands of the court a strict construction, holding that they could only approve so far as the law gives power, but as to powers not mentioned or alluded to in the act, they could not certify the same. The court cite from *Kid on Corporations*, 61, in which the author speaks of powers existing in certain corporations, which powers could not at common law be granted by the king. In such case, recourse must be had to parliament, to grant them or to confirm such as had been granted by the king, as in the case of the universities of Oxford and Cambridge, and the college of physicians in London. The principle is relied on, that even in charters granted by the Legislature, the corporation has no powers except what are expressly granted or necessary to carry the same into effect. The court sum up the powers which they are authorized to grant, and are those only which are at common law incident to every corporation: perpetual succession, a common seal, to sue and capable of being sued, making by-laws and holding property. The concluding sentence of the opinion is: These powers are enumerated in that act; our authority extends no further, and when an association wishes other authority, or other or greater powers, such can only be obtained from the Legislature of the State. It is true that the act of 1840 does not contain the enumeration of the common law incidents of a corporation, but it states the purpose of the act to be to confer immunities of a corporation or body politic in law, which can mean only such as by the common law were necessary to constitute a corporation. Those that are special can only be granted by the law-making power of the State, and as we have seen that no such incident as that here claimed belonged to a corporation at common law, we are required to hold that so much of the charter of this club as contravenes the general law, and is not a necessary incident of a corporate body, must be regarded as though it had not been inserted in the charter, and that in lieu and place of it, must be applied the rule of the majority of the members, instead of the vote cast according to the majority of the shares of stock held by the members of the corporation.

John H. Sloan, Esq., for relator.

John C. Knox, Esq., for respondent.

[*Leg. Int.*, Vol. 30, p. 208.]

PETITT vs. BAIRD.

In equity, all parties to be affected by the decree must be joined.

In equity. Opinion delivered June 21, 1873, by

PAXSON, J.—The bill in this case was filed against Matthew Baird and the executors of the late M. W. Baldwin. The plaintiff claims that by virtue of an alleged agreement with the late Mr. Baldwin, he is

entitled to a share of the profits of said firm, and prays for an account. Some time after the filing of this bill, he amended the same by striking out the names of the executors of Baldwin. To the bill as thus amended defendant Baird demurred.

If the plaintiff had brought his suit at law, the omission of the executors would have been proper. But in equity the rule is different. All parties to be affected by the decree must be joined. If the plaintiff succeeds in this suit the estate of Mr. Baldwin may be liable for contribution. It is the right of Mr. Baird to have the executors brought in, so that they may be bound by any decree, if any, to be hereafter rendered.

Having joined the executors originally, it seems difficult to see why the plaintiff should have struck them out of his bill, unless, indeed, it were to enable him to be a witness. This is ingenious, but carries with it the penalty of making the bill defective for want of proper parties.

Demurrer sustained.

[*Leg. Int.*, Vol. 30, p. 208.]

PLYE vs. PLYE.

It seems that a marriage under the duress of an arrest and threat of imprisonment on a false charge is ground for divorce.

In this case the court refused to find such duress upon the unsupported testimony of the libellant.

Opinion delivered *June 14, 1873*, by

ALLISON, P. J.—The proceedings for divorce, instituted by the husband, are grounded upon the allegation of force or duress. The testimony shows that he was arrested upon the oath of the respondent, which charged seduction, under promise of marriage. When brought together in the office of the alderman, the libellant promised to marry the respondent in two weeks from that time, whereupon, the proceedings were dismissed, and the defendant discharged; this was on the 6th of May, 1872. Four days thereafter the respondent again made oath against the libellant, charging that he was about to abscond; he was again arrested, taken before the alderman, who states in his testimony:—"I told Mr. Pyle, before he offered to marry the respondent, that as she had sworn that he had seduced her under a promise of marriage, I would have to hold him to bail, to answer the charge. He then said, 'I will marry her now.' I then married them, and after the ceremony, I discharged the libellant." This is confirmed by the testimony of the constable.

The libellant was examined as a witness. His statement is, that "the respondent, her brother and the alderman, told me that if I did not marry the respondent, I would be imprisoned. The respondent and her brother threatened to send me to the penitentiary for three years, if I did not marry her. Under these threats, and fearing they would send me to the penitentiary, I consented to the marriage. I never seduced the respondent, and never promised to marry her, until after she had me arrested."

The material facts denied by the libellant stand unsupported by any other testimony in this cause, and we think it is of little value. As shown by the testimony, he put in no denial of the seduction under promise of marriage, upon either arrest, upon each occasion promising

to marry the respondent. Nor is his statement of threats of imprisonment corroborated; negatively, it is contradicted. The testimony of both the alderman and the constable is, that he was informed that he would be required to enter bail to answer the charge.

It has been held in *Jackson vs. Winne*, 7 Wend. 47, that if a man who is arrested under a bastardy process, as the putative father of the child, of which the woman procuring the arrest is pregnant, marry her, even though being unable to procure bail, he do it purely to avoid being imprisoned, and though it afterwards appear he could have made a successful defence, still the marriage is good: *Scott vs. Shufeldt*, 5 Paige, 43, is to the same effect. The doctrine seems to be qualified that it would, perhaps, be different if the arrest was under a void process, or upon a false charge: Story on Contract, sections 88, 89.

In *Collins vs. Collins*, 2 Brewster, 515, it was decided by this court, that the falsity of the charge is essential, and Judge Brewster, who delivered the opinion in that case, found as a fact established by the testimony, that the charge was false, and the threat to imprison was upon process sued out maliciously and without probable cause.

In this case we do not feel ourselves justified in reaching a similar conclusion upon the unsupported testimony of the libellant, and, therefore, discharge the rule, and refuse the divorce prayed for.

And now, to wit, June 14, 1873, on motion of G. W. Arundel, Esq., the report of the examiner is referred back to him to take additional evidence.

George W. Arundel, Esq., for libellant.

Edgar M. Chipman, Esq., for the respondent.

[Leg. Int., Vol. 30, p. 225.]

In Re Complaint against the PRESIDENT, MANAGERS AND COMPANY of the FRANKFORD AND BRISTOL TURNPIKE ROAD.

An inquisition to compel a turnpike company to open its gates, because it is not in such "good and perfect order," as required by the act of 1803, must be in strict conformity with the requirements of the act.

Opinion delivered July 5, 1873, by

PAXSON, J.—This was a *certiorari* directed to Alderman Thaddeus Stearne, and inquest, to send up the record in the above case.

The proceeding was instituted under the act of 24th of March, 1803, P. L. 418, incorporating said company, and the object of it was to compel the company to open its toll gates, upon the allegation that the road was not in such "good and perfect order" as required by the act of assembly aforesaid.

By section 16 of said act it is provided, "That if the said company shall neglect to keep the said road in good and perfect order for the space of five days, and information thereof shall be given to any justice of the peace of the neighborhood, such justice shall issue a precept to be directed to any constable, commanding him to summon three disinterested freeholders to meet at a certain time in the said precept to be mentioned, at the place in the said road which shall be complained of, of which meeting notice shall be given to the keeper of the gate or turnpike nearest thereto, and the said justice shall, at such time and

place, by the oaths or affirmations of the said freeholders, inquire whether the said road or any part thereof, is in such good and perfect order and repair as aforesaid, and shall cause an inquisition to be made under the hands of himself and a majority of said freeholders; and if the said road shall be found by said inquisition to be out of order and repair, contrary to the true intent and meaning of this act, the said justice shall certify and send one copy of the said inquisition to each of the keepers of the turnpikes or gates between which such defective places shall be, and from thenceforth the toll hereby granted to be collected at such turnpikes or gates for passing the interval of road between them, shall cease to be demanded, paid or collected, until the said defective part or parts of the said road shall be put in good and perfect order and repair as aforesaid," etc.

The inquisition sets forth a complaint made before Alderman Stearne, on the 15th day of May last, by Wm. J. Fries, Lewis P. Allen, and John F. Kinsey, in which it is alleged that certain portions of said turnpike road, specified in said complaint, were in very bad condition and out of repair, etc., and had been so for more than five days prior to the making of said complaint.

Then follows the precept of said alderman directed to the constable of the Twenty-third ward, commanding him to summon "three disinterested persons" to view said road, etc. To the said precept the constable made the following return: "In obedience to the within precept I have summoned three disinterested citizens, good and lawful men of my bailiwick, to be and appear at the time and place within mentioned, May 16, 1873, as by this precept I am commanded."

The inquest met on the ground on the 22d day of May, the time designated in the precept, and proceeded to view the road, and hear testimony, and upon the same day condemned the road as being out of order and repair, contrary to the act of assembly aforesaid.

A number of exceptions were filed on behalf of the turnpike company to these proceedings. The first exception is, that the alderman had no jurisdiction; the act of 1803, before cited, conferring the jurisdiction upon justices of the peace. That the act in question does not confer this jurisdiction upon aldermen is clear. At the time of its passage there were no aldermen within the territorial limits of this road, and the power conferred by the act could only have been exercised at that time by justices of the peace. But it is provided by the 23d section of the act of 20th of March, 1810 (Purdon, 847, pl. 26), that "the like jurisdiction and authorities vested by this act in the justices of the peace within this Commonwealth, shall be and they are hereby vested in each and every of the aldermen appointed within the city of Philadelphia, who shall, in all cases, exercise all such powers within the said city, which any justice of the peace may exercise within any courts in this State, and shall be entitled to like fees; and in all cases shall be under and subject to such limitations, restrictions and provisions, as justices of the peace are, in like circumstances, subjected to by this act." It was contended by the learned counsel for the company that this section only conferred upon aldermen the power which had been by said act therein conferred upon justices of the peace, and was not a grant of general powers, or of any power, not specified in said act. But we

think the section referred to is entitled to a broader interpretation, and that in addition to conferring upon the aldermen all the jurisdiction given to justices of the peace by the act of 20th of March, 1810, it confers upon the former in all cases, all such powers within the said city which any justice of the peace may exercise within any county in this State. That this interpretation of the section referred to is the correct one, is apparent from the language of the act itself, and as it has been acted upon, and acquiesced in by the bar and the public for over sixty years, it is too late now to disturb it.

The 2d, 3d, 4th, 5th and 6th exceptions may be considered together. They are all directed to the fact, that it does not properly appear upon the face of the proceedings that the three persons summoned by the constable were freeholders. It is hardly necessary to say, that as this qualification is imposed by the act of assembly, it cannot be dispensed with; on the contrary, the record must show affirmatively that it has been complied with. The statute under which this complaint was instituted is highly penal in its nature; the proceedings themselves are of a summary character, and in derogation of common law rights.

The precept of the alderman and the return of the constable are both defective in this respect. The precept requires the constable to summon "three disinterested persons." The constable makes return that he has summoned "three disinterested citizens," without naming them. Not a word here about "freeholders." Nothing even to designate the citizens whom he summoned, or to show that the three citizens who acted upon the inquest were the persons referred to by the constable in his return. Standing alone, these defects would be fatal, but it was strenuously argued by the learned counsel for the complainants, that said defects have been cured by the inquisition; that it appears therein that the three persons referred to were freeholders respectively, and were summoned by the constable. It is true that said inquisition does set forth that by virtue of the said precept the constable made return to said alderman and jury that he had "summoned Christian H. Geisse, John Holden and Jeremiah Quickshall, three disinterested persons," etc. What the constable did return is in writing, is attached to the inquisition, and contradicts the finding thereof. It also appears that objection was made to one or more of the inquest by the company, whereupon they were respectively examined on their *voir dire*, and each juror stated that he was a freeholder. I quote from the proceedings: "Defendants ask for an adjournment; objected to by complainants; objection sustained; jurors sworn and examined on their *voir dire*, and answer severally that they are freeholders in this county." There is nothing here but the statement of each juror that he was a freeholder. There is no finding of that fact by a tribunal competent to pass upon it. At most it is only evidence tending to establish a fact. The inquest, even if competent to pass upon the qualification of its own members, in no place finds the fact that the members thereof were freeholders. The inquisition nowhere refers to them as such. It speaks of them as "said alderman and jurors."

In this case we have no record made up by the alderman. We have only the inquisition made by that officer and the three persons summoned by the constable. The finding of facts by the inquisition is con-

clusive as to all matters properly submitted to it, and as to which the inquest was charged to inquire. In landlord and tenant cases such finding has been held to cure certain defects or omissions in the proceedings. It may be stated generally, that the finding of a fact by the inquisition in such cases, as to which it was the province of the inquest to inquire, cures the omission to set out such fact in the preliminary proceedings. But the rule to be applied to this case is more strict than in cases of landlord and tenant, for the reason that in the latter, the proceedings, though summary, are not penal; they rest entirely upon contract.

I do not think the inquisition cures the defect referred to. The objection was made at the earliest moment, and the defendants are entitled to avail themselves of it here.

The precept should have commanded the constable to summon "freeholders;" the return of the constable should have set forth the fact that the persons summoned, naming them, were freeholders. The omission to do so leaves the proceedings without any proper evidence of this necessary qualification, and would have been a sufficient ground to quash the array, if there had been any mode by which such a proceeding could have been instituted, or any tribunal before which it could have been properly heard. While we would not exact unnecessary strictness in matters of form in such cases, we cannot dispense with matters of substance. Here form and substance are alike omitted. The constable in the first instance determines the qualifications of the inquest. He is to summon "three disinterested freeholders." This return, if properly made, is *prima facie* evidence that they are such, and conclusive unless challenged for cause, and the contrary shown. In the latter case it would rest with the alderman to decide the challenge and pass upon the question of their qualifications. If they were not such persons as the precept commanded the constable to summon, it might, perhaps, be his duty to issue another precept, and have other persons who did possess the qualifications summoned. In no event could the inquest sit in judgment upon the qualifications of its own members; and as neither the constable nor the alderman have officially certified to the fact that either of the three persons referred to was a freeholder, we think the proceedings are radically defective.

I might pause here, but as our decision may result in the commencement of the suit *de novo*, I will briefly refer to some of the remaining exceptions as bearing upon the law of the case.

The 7th and 8th exceptions allege that two of the inquest were not "disinterested;" and the ground of this allegation is, that they sometimes travelled the road and paid toll. This, if so, would not amount to a legal disqualification. The objection might be urged against any citizen of the Commonwealth who may have occasion to use their road. I do not think the fact that a man has used the road and paid toll in the past, or may do so in the future, renders him legally incompetent to serve on the inquest. I am, however, free to say, that the constable ought, in such case, to obey the command of the alderman's precept in its spirit as well as its letter, and if not possible to summon freeholders who did not use the road at all, to at least summon such as by their location and business have occasion to do so but seldom. If it should appear to the

court in any future proceeding, that the members of the inquest were large toll-payers of the road, it might materially lessen the weight we would otherwise feel disposed to give to their verdict upon the facts.

It was also alleged by the ninth exception that the members of the inquest were improperly sworn. The inquisition shows that they were sworn not only to inquire into the condition of the road, as required by the law, but also "of such other matters and things as shall be lawfully required of them in the premises." The latter part of the oath should have been omitted. The inquest had nothing to do with any "other matters."

The remaining exceptions are not important, and any discussion of them is unnecessary.

The 2d, 3d, 4th, 5th and 6th exceptions are sustained, the inquisition set aside, and all proceedings subsequent to the complaint are quashed.

John G. Johnson, Esq., for company.

William Grew and George Peirce, Esqs., contra.

[Leg. Int., Vol. 30, p. 225.]

TWADDELL vs. THE HAMILTON LAND AND IMPROVEMENT COMPANY.

Testator devised to his wife in trust for herself and children, and, after a certain time, "if the executor thinks it will be more productive," the property to be sold, and the money divided. The parties in interest, having elected by deed to take the land in lieu of the proceeds of the sale thereof—*Held*: That a deed from them, *without joining the executor*, passed a good title to defendant.

Opinion delivered July 5, 1873, by

PAXSON, J.—This cause was heard upon bill and answer. The point raised by the pleadings was before this court in *Twaddell's Estate*. It comes up now in a different form, and between other parties, and must be decided again. The whole question of title, and the rights and powers of the trustee under the will of John P. Twaddell, were so fully discussed by my brother Peirce, in his opinion in the estate referred to, (see *Legal Intelligencer* of January 10, 1873,) that it is unnecessary to go over the same ground, or elaborate the views already expressed by him.

We regard it as clear that the trustee was the mere donee of a power. He did not hold either the legal or the equitable estate. The real estate in question was devised by the testator to his wife, Lydia B. Twaddell, in trust for herself and children. The said Lydia was to have the care and control of it, the will authorizing her to use her judgment as to the best method of managing the real estate, to make it productive; then follows the power of sale in these words: "and after the expiration of fifteen years, (or one, or two, or three years after, if the executor thinks it will be more productive) the above-described farm in Blockley township (the real estate in question) . . . to be sold to the best advantage, and the money to be appropriated and divided as follows:" distributing the same between his widow and children. The executor here is given a limited discretion in regard to the time of sale; and there being a power of sale in the will, without any designation of the person who is to execute it, under the 12th section of the act of 24th February, 1834, the power could be exercised and carried into effect by the executor. He could do so, however, only under the control and direction of the Orphans' Court.

The legal estate did not vest in him, and herein the case differs from a naked authority to an executor to sell; the legal estate was given by the express terms of the will to Lydia B. Twaddell; and it could not vest in her and also in the executor at the same time.

It is equally clear that the deed poll of 5th of September, 1861, by which all the parties in interest elected to accept and take the said real estate as land in lieu of the proceeds of the sale thereof, and to dispense with any such sale, was a valid and binding act; and that notwithstanding any question of a conversion by the prior act of the executor in determining to sell the land. What then was the position of the executor after the execution of said deed, as regards the power, and the title to the land? The former was gone—as completely obliterated as if it had never been created, and the legal title had never been in him; after the execution of the deed in question, there was not the shadow of a power or a title left in the executor.

By the decree of this court in *Twaddell's Estate* before referred to, the executor was directed to convey to the petitioners (Mrs. Twaddell and her children) all his interest in, and power and right of control of said estate. That this order may not leave the impression that the court at that time regarded the executor as having some interest, I will quote from the opinion of Judge Peirce:

"And they (the heirs,) having elected so to take, the executor had no further duty to perform in respect of it. There was no title to the estate vested in him, and as the power of sale was defeated by the act of the parties in electing to take the property as land, *there is nothing in him to release or convey to the parties*. But as the Supreme Court has said, that in such cases, there rests a cloud upon the title, which embarrasses the right of alienation, it is deemed best to decree a conveyance by the executors to remove this cloud."

The executor having raised this cloud himself, it seemed proper to require him to remove it; yet how slight a cloud it is, may be gathered from the words of Judge Peirce above cited. And when we take into consideration the fact that in *Kay vs. Scates*, 1 Wr. 31, where the Supreme Court ordered a conveyance by the nominal trustee, to remove "the cloud," upon the title; and in *Rush vs. Lewis*, 9 Harris, 72; and *Kuhn vs. Newman*, where they refused to order such conveyance, there was a legal estate in the trustee, which was always in the line of title to frighten conveyancers; while in this case, there was never an estate of any kind in the executor, and nothing whatever in the line of title to disturb the members of that profession, it is easily seen that we have no difficulty in arriving at the conclusion that the title of the plaintiffs is a good marketable title in fee simple, which the defendants are bound to accept. In this opinion I am sustained by all of my colleagues.

Let a decree be entered for the plaintiffs.

J. C. Longstreth and H. C. Townsend, Esqs., for plaintiffs.

H. M. Dechert, Esq., for defendant.

[Leg. Int., Vol. 30, p. 225.]

PICKERING *et al.* vs. COATES *et al.*

A trust for the separate use of a woman cannot be created, unless she is covert, or in contemplation of marriage.

Opinion delivered *July 7, 1873*, by

PAXSON, J.—This case was heard upon bill and answer. Elihu Pickering by his last will and testament, admitted to probate in 1849, bequeathed certain personal estate to the defendants in trust, for the sole and separate use of the plaintiffs, who were his three daughters. The trustees were directed to “invest all sums of moneys coming into their hands in good ground-rents or mortgages of real estate bearing interest at least half yearly, and collect the interest or income thereof as it shall become due and payable, and pay over the same into the hands of his said daughters for and during all the term of their natural lives, to and for their sole and separate use and benefit, so that the same shall not be in their power, at the disposal, under the control, or liable in any way or manner whatever, of or to the debts, contracts or any engagements of any husband that either of them may have or take.” There is no limitation over in terms, but by the second paragraph of said will, the intention of the testator would seem to be clear that there should be an equal division of his estate among his children, after the death of his wife, and that they should take an estate of inheritance.

Mary Pickering, one of the daughters, intermarried with Richard Paxson before the execution of the will, and prior to the death of her father. The other daughters, Anna and Alice C., were unmarried at his death, and were not in immediate contemplation of marriage. They have remained single to the present time. The said Richard Paxson died on the 3d day of February, 1872.

The bill avers that the said trusts were always invalid as to Anna and Alice C., and that since the death of the said Richard Paxson, they have been inoperative as to his widow, the said Mary Paxson. We are asked so to decree, and to order that the defendants, trustees, shall transfer and assign to each of the said plaintiffs, her share of the money, or other trust assets derived by the said defendants from the estate of the said Elihu Pickering, and held by the said defendants for the benefit of said plaintiffs under the said will. To this bill the defendants have put in an answer admitting all the facts as therein alleged, and submitting themselves to the order of the court.

If this trust can be sustained at all, it must be as a sole and separate use trust. The exigencies of this case do not require us to follow and note the path of judicial decisions involved therein. It is sufficient to say that under the law as now settled, a trust for the sole and separate use of a woman not married, nor in immediate contemplation of marriage, is invalid.

The marriage must be in immediate view when this trust is created. As was said in *Wells vs. McCall*, 14 P. F. S. 207, “immediate contemplation of marriage means a marriage presently in view of the donor, to take place with a particular person a short time after the instrument is to go into effect.”

Whether a person is in immediate contemplation of marriage is a fact to be determined by all the surroundings of each particular case. It is not necessary that it should appear specifically in the will or other instrument creating the trusts. A contemplated marriage is a fact that discloses itself: *Wells vs. McCall*, above cited.

Two of the testator's daughters remained single for a quarter of century after this will was made. It cannot be said of them that they were in immediate contemplation of marriage at the time of testator's death. The remaining daughter was married at the period last referred to, but she is now discoverd. Under the authority of *Smith vs. Starr*, 3 Wh. 62; *Hamersley vs. Smith*, 4 Wh. 126; *Harrison vs. Brolaskey*, 8 Harris, 299; and other cases, a trust for the sole and separate use of a married woman ceases upon her becoming discoverd and is not revived by her second marriage. It thus appears by the pleadings in this case, that two of the testator's daughters were not in immediate contemplation of marriage at the time of the testator's death, and as to the third, she was discoverd at the time of filing this bill. This is a sole and separate use trust and nothing more. Whatever may be the rule in the English courts, it is here too well established to be disturbed by authority else than a legislative enactment, that a separate use for a woman cannot be created unless she is covert, or unless in immediate contemplation of her marriage: *Potts' Appeal*, 6 Casey, 168; *Dubs vs. Dubs*, 7 Casey, 149; *McBride vs. Smyth*, 4 P. F. S. 245.

Let a decree be entered for the plaintiffs.

John Goforth and Wm. H. Yerkes, Esqs., for plaintiffs.

[Leg. Int., Vol. 30, p. 226.]

SIMSON vs. BATES.

A court of equity will not restrain a creditor from levying upon the property of his debtor's wife, when by fraud and collusion she has been active in defeating her husband's creditors, or when her title to the property is disputed. The creditor has a right to test ownership, and she will be left to her remedy at law.

Opinion delivered July 5, 1873, by

PAXSON, J.—The plaintiff, who is a married woman, obtained a special (*ex parte*) injunction against the defendant, who is an execution creditor of her husband, to restrain him from selling her separate real estate. The defendant having filed an answer, now moves to dissolve said injunction.

The bill sets out the plaintiff's title to the real estate in question, and alleges that it was bought by her—the deed taken in her own name, and the property paid for out of moneys received by her from the estate of her mother, who was a resident of the kingdom of Bavaria, in which country she died in the year 1870.

The answer of defendant, Bates, sets forth that he has no knowledge as to the facts above stated, but that, "from the best of his information," he believes them to be untrue, so far as they relate to the purchase-money of said premises.

It also avers that the judgment under which the property of the plaintiff had been levied upon was recovered in the District Court of this city against Zachariah Simson, the husband of plaintiff, and one William N. Dewees, trading as Simson & Dewees, in an action brought

to recover the value of certain goods sold to said firm, and delivered to them at their store, No. 429 Race street; that the said Zachariah Simson filed in said suit an affidavit of defence, in which he alleged under oath, *inter alia*, "that he is not a partner in the firm of Simson & Dewees, but that the said firm is composed of Nannie Simson (plaintiff) and William N. Dewees." Said answer further alleges that the defendant issued an execution upon said judgment, under which the goods in said store were levied upon; whereupon the said Nannie Simson claimed to be the owner of said goods, and gave the sheriff notice to that effect. Further, that upon a pluries writ of *fiery facias* issued upon said judgment, he caused a levy to be made upon the goods in said store, as well as upon the household furniture at the residence of the said Zachariah Simson, No. 1828 North Seventh street, and that the said Nannie Simson claimed that she was the owner of said household goods, and also joint owner with one Charles Badenfeld, of the goods and chattels in said store, of which the sheriff was duly notified.

Hunter's Appeal, 4 Wr. 194, decided that "under the act of 11th of April, 1848, and 12th of April, 1850, the levy and sale of a wife's real estate by a creditor of her husband's on execution against him, is contrary to law, and may be restrained by injunction," with the qualification that "in order to authorize the interference of a court of equity, a clear case of title in the wife under the acts of 1848 and 1850 must be made out; otherwise the court will not interfere, but leave the parties to their remedy at law." In the case above cited the title of the wife was not disputed by plea, answer or demurrer. In a latter case, *Winch's Appeal*, 11 P. F. S. 424, the Supreme Court held, that "when the title of a wife is disputed, and when a creditor has a right to proceed against the property to test the title, it is error to assume jurisdiction in equity and enjoin against the creditor's execution, and thus withdraw the facts from a jury," and that "equity will restrain a creditor only when he is clearly and indisputably proceeding against right and justice to use the process of the law to the injury of another."

A creditor of the husband has a right to levy upon and sell whatever interest he may believe the latter has in the real estate of his wife. It is only when the process of the court is used against admitted right, to the injury of the wife, that equity will interfere. Nor will it aid the wife when she has been guilty of fraud or collusion with her husband, whereby his creditors are kept at bay. We are not prepared to say in this case that the plaintiff has been guilty of such fraud or collusion; but the allegations in the answer certainly show that she has been active in defeating the creditors of the firm of which her husband was a member. She may have been right in all this. We cannot say she is not, without prejudging her case; but it is sufficient to indicate that the defendant is not using his execution for the purpose of oppression, or of inflicting wrong or injury to the plaintiff. He is merely pursuing his legal remedies under considerable difficulties. I do not think the case one in which equity ought to interfere. If the property should be sold, the title can be tested in an action of ejectment and the facts passed upon by a jury. The plaintiff should be left to her remedy at law.

Injunction dissolved.

Walter J. Budd, Esq., for plaintiff.

D. R. Patterson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 226.]

ASH vs. BOWEN.

The court declines to make a decree upon a judgment *pro confesso* which appears to have been taken collusively.

In equity. Opinion delivered July 5, 1873, by

PAXSON, J.—We are asked in this case to decree that the trust created by one of the plaintiffs, Ellen Margaretta Ash, *nee* Narland, by her indenture of 11th of April, 1856, is invalid, for the reason, as alleged in the bill, that at the time of the execution of said deed, and the creation of said trust, she was neither married, nor in immediate contemplation of marriage. The bill avers that at that time she did not know Thomas Reeves Ash, with whom she has since intermarried, and who is joined with her as plaintiff.

To the said bill, the defendants, who are the trustees named in the deed, have not filed either a plea, answer, or demurrer. The learned counsel, who at one time represented them, for reasons which were no doubt satisfactory, by leave of court withdrew his appearance for said defendants; after which a judgment *pro confesso* by default was entered against them. Upon this state of the record the plaintiff moves the court for a decree in her favor.

We cannot close our eyes to the fact that there is collusion in this case. We are asked to strike down this trust, and order a reconveyance of the trust estate to the *cestui que trust* upon her mere statement, and to take what we cannot but regard as a collusive judgment by default as establishing the averments of the bill. This, notwithstanding the fact, which appears of record, that the plaintiff, Ellen Margaretta Narland, was married to her husband, Thomas Reeves Ash, in less than one year from the execution of her deed of trust. It may be, as she alleges in the bill, that she did not know him at the time she executed said deed; yet a due regard for the proper administration of equity prevents our entering any decree in the present state of this record.

Under all the peculiar circumstances of the case, let the judgment *pro confesso* be opened, an answer put in by the defendants, and proofs taken, if necessary. The cause will then be ripe for a hearing upon the merits. At present, we decline to make any decree.

S. Davis Page, Esq., for plaintiffs.

[Leg. Int., Vol. 30, p. 226.]

COMMONWEALTH *ex rel.* CHARLES BRECHEMIN vs. THE UNION BURIAL GROUND SOCIETY.

Membership of a corporation—Right to vote.

Petition for mandamus. Opinion delivered July 5, 1873, by

LUDLOW, J.—By the petition filed in this case, we are asked to command "The Union Burial Ground Society of the city and county of Philadelphia," to receive the vote of one Charles Brechemin.

The right of the relator to vote depends upon the organic law of the society; to that, and to that alone, can we look for a solution of the question now before the court.

It will hardly be contended that a person who is not a member of the society could vote, unless some such right existed in the charter, or in a by-law passed under the authority of the charter; and when, therefore, we find an absence of any provision relating to persons who are not *members*, we are necessarily confined to the rights of those, and those only, who are members.

In the second article of the charter, we find a provision which clearly declares who shall be the members of this society, "it shall consist of such persons, citizens of this Commonwealth, who *may be admitted* members, and comply with the articles and rules hereinafter mentioned."

The relator and those he now represents never have been admitted into the membership.

It is, however, argued that the heirs and legal representatives of one Louis Brechemin have a right to vote, because a lot had been sold to one William Martin, "his heirs and assigns forever," in 1828, and the relators claim by assignment from and under the original grantee.

Under the constitution, article 11, we presume William Martin to have been a member, but we are at a loss to understand how a conveyance to Martin, "his heirs and assigns," could confer upon his legal representatives in the ownership of the lot merely, the personal rights which are conferred upon persons, citizens of the Commonwealth, and who, as such, were *admitted* members, the rights of membership.

The resolution of 7th of February, 1859, was evidently intended to permit a representation of the owners of lots not members of the society, by a legal member; hence "any members duly authorized by a family or owner of a lot, and bringing the deed, shall be entitled to vote and participate in the meetings of the society."

If any other construction can be placed upon this resolution, then it is in conflict with the constitution, for no person can be a member unless he shall be admitted as such.

An attempt was made to remedy a defect in the constitution by the passage of additional by-laws, but that this could not be accomplished will appear by reference to article 25, chapter 1, of the constitution, which declares that alterations and amendments may be made, "Provided, there be not less than one hundred at the meeting."

It is not pretended that members to the number of one hundred ever attended the meetings, and hence, any by-laws or resolutions which changed radically the qualifications of members, or the test of membership would be null and void.

On the whole case we are of the opinion that the relators have no rights as members technically so called, under the constitution, and we must, upon the pleadings, enter judgment upon the demurrer for the defendants.

John Hanna, Esq., for plaintiff.

George D. Budd, Esq., for defendants.

[Leg. Int., Vol. 30, p. 256.]

WEST PHILADELPHIA PASSENGER RAILWAY COMPANY vs. THE CITY OF PHILADELPHIA *et al.*

1. A passenger railway company having laid their road in the streets of the city of Philadelphia, under authority of a charter from the State, are liable to the regulations adopted by councils for the preservation of the public rights in the highway.
2. But where an obstruction arises by the laying of another railway track on the same street, under a subsequent charter, it is not reasonable ground to authorize a city ordinance to require the removal of the first track, and such removal by the city authorities is illegal, and will be restrained by injunction. Such removal is not a public work under the act of April 8th, 1846.
3. A passenger railway company having accepted their charter with the knowledge that the city possessed the most ample power to legislate by ordinance as to her streets and highways, to make all needed regulations for the most convenient enjoyment of the same, by the citizens of the Commonwealth, they are bound by an implied agreement to hold their special privileges subject to a proper exercise of this power by the councils of the city.
4. The vital question in every such case is, is the regulation or order of the municipal authority reasonable and necessary? If it is, it will be maintained; if it is not, it will be set aside.

Opinion delivered *July 25, 1873*, by

ALLISON, P. J.—On the 21st day of June, 1873, the councils of the city of Philadelphia passed an ordinance, which orders the straightening of the tracks of the West Philadelphia and Union Passenger Railway Companies on Market street.

This ordinance directs the companies to remove their tracks to the central parts of Market street, between Front and Broad streets, upon such lines and in such contiguity as the chief engineer and surveyor may direct. In default of a compliance with the requirements of the ordinance, the chief commissioner of highways is directed to cause the same to be done, and the city solicitor is empowered to collect the cost of change of track from said companies.

The execution of this ordinance is opposed by the plaintiffs, and an injunction is asked to restrain the officers of the city from carrying it into effect, on the ground of a want of power in the city of Philadelphia to take from them any of their existing lines or tracks of railway, or to substitute any other line or track for that which they now have, or to impose any charge or burden upon them. The plaintiffs further say they are advised that by no act of assembly have they any right or franchise to lay new tracks in different locations from those long since adopted and laid down by them, and to accept, use or operate any such new line.

This general proposition is denied by the defendants, and the execution of the power which they claim is defended; first, on the general corporate authority of the city, as expressed in the act of consolidation, and the charter of the city, which was supplied by the act of 1864, which latter act contains the express stipulation that in addition to the new powers granted to the city by the act of consolidation, should also be retained those which had theretofore been conferred on the municipality. These powers of regulation and control were most comprehensive in their scope and operation. Over the streets and highways of the city ample authority is given. This includes the right to lay out and

establish streets, determine lines and grades, pave and keep them in repair, and generally to see that the free and common right to an unobstructed passage over them is secured to the public. In the case of the *Commonwealth vs. The Central Passenger Railway Company*, 2 P. F. Smith, 506, the Supreme Court have decided that, to a certain extent, the city is the owner of the highways within her boundaries. The power, therefore, of the city to regulate the use of the streets for the public welfare is a near approach to an absolute power, and no authority short of the Legislature may abridge the dominion which the municipality possesses over highways, when that dominion is exercised inside of the grant of municipal corporate authority. That the Legislature may do this is beyond question; that which it has given to the local government it may take from it; it may entirely abrogate the power of the city over streets; or it may modify or change the same according to its will or caprice. In the exercise of this right, grants are every year made to private corporations, or to associations of individuals, of limited and restricted use of roads and streets, and to the extent of such grant, in any given case, is the general power of a municipality abridged. And yet these grants of special privileges must, in order to control or override the general powers of a public corporation, be clearly conferred. In the case of the *Commissioners vs. Gas Company*, 2 Jones, 320, the court say, any ambiguity in the grant must be construed against them, and in favor of the public. The rule of construction is, that in all such cases, any ambiguity in the charter must operate against the corporation and in favor of the public. In the *Trenton Water Company*, Pennsylvania Law Journal, 32, the rule is stated thus: Private corporations take their rights subject to the rights of individuals and communities; and the strong presumption of law is always against unconditional adverse privileges. This doctrine was recognized and acted on by this court in the case of the *North Pennsylvania Railroad vs. Stone*, 3 Phila. R. 421, where the city, by several acts of assembly, was authorized to culvert Cohocksink creek. The plaintiff was also by an act of assembly empowered to construct a railroad upon certain streets of the city. We held that the city could temporarily remove the railway of the plaintiffs, to the extent to which the same was necessary in the execution of its undoubted right to build the culvert; that the interests of the private corporation must for a time give way before the higher right of the public, whose convenience, comfort and health were all to be conserved by the construction of the culvert.

To this may also be added the general principle that where a private corporation accepts the grant of a franchise upon a highway, over which a municipality possesses a general power of regulation and control for public purposes, it accepts its special privileges upon the implied condition that it holds them, subject to the reasonable and necessary exercise of the general power of the municipality. "Until the Legislature overrides the local authorities their jurisdiction is not ousted:" *Philadelphia vs. The Lombard, etc., Railway*, 3 Grant, 405.

We do not, therefore, agree with the plaintiffs in the radical position on which they rest their application for an injunction, asserting that they are beyond all municipal control, in regard to a modification, or

change of the lines and track of their road, even when such modification is required by public necessity or convenience. We hold, on the contrary, that, having accepted their charter with the knowledge that the city possessed the most ample power to legislate by ordinance as to her streets and highways, to make all needed regulations for the most convenient enjoyment of the same, by the citizens of the Commonwealth, they are bound by an implied agreement to hold their special privileges subject to a proper exercise of this power by the councils of the city. This looks to regulation only of the franchises of the corporation, not to a restriction or destruction of corporate rights, and this regulation must be reasonable and necessary for common benefit, not in restraint of trade or imposing a burden without an apparent benefit: *Goddard's Case*, 16 Pickering, 504. Upon this principle the case in 2 Jones, 320, of *Commissioners vs. The Gas Company*, was decided. An ordinance of the Northern Liberties, prohibiting the opening of streets for the purpose of laying gas mains between December and March, was held to be a reasonable regulation, which bound the private corporation; and an ordinance which prohibited the gas company from opening streets for the purpose of introducing gas into dwellings was declared to be null and void, as an unreasonable exercise of authority. The vital question in every such case is, is the regulation or order of the municipal authority reasonable and necessary? If it is, it will be maintained; if it is not, it will be set aside.

This principle must not be confounded with that which was asserted in the case of *The West Philadelphia P. R. W. Co. vs. The Commissioners of Public Buildings*, Legal Intelligencer of March 28, 1873. It was asserted upon the argument that the ruling in that case was conclusive of the present motion in favor of the plaintiffs. We then said the act of August 5, 1870, under which the defendants claimed a right to take possession of a portion of the track and roadway of the plaintiffs, whereby their property in this portion of the road, and all corporate franchises incident thereto, were utterly destroyed, was null and void; because it was in conflict with the constitution of the State, which declares, that private property shall not be taken for public use without first making or securing compensation to the owner. We also said: It is true the defendants have proposed to give a new line or route of railway to the plaintiffs as a substitute for that which they intend to take from them. This route diverges from complainant's tracks at Merrick street, and is carried around the north and south sides of the proposed new buildings, etc. Our answer to this was, this would be satisfactory, if it were not for two substantial objections. First, plaintiffs have not the power to accept the offer of defendants; and second, the defendants possess no such rights as they propose to confer on the plaintiffs. The general remarks which follow this sentence, in the opinion of the court, as to the want of power in plaintiffs to lay new tracks on Market street, must be taken in connection with the point then under consideration, namely, a change of route of the Market street road, and the power to change location of track on Market street at the will of the plaintiffs, and of their own motion, which is an entirely different question from that which arises when the city becomes the actor, and from the highest considerations of public policy and necessity, undertake to regulate the use of the

street by ordinance, prescribing a change in location of a track of a railway in a street. If this does not amount to a destruction of corporate franchise, or to a serious injury to them, and if common benefit makes it proper and necessary that it should be done, we think it is within the power of the municipality to direct such change, and to see that it is accomplished. But the defendants further argue against the injunction, upon the ground that by an express stipulation of their act of incorporation, the plaintiffs have agreed to the exercise of the power now sought to be enforced. The 12th section of the act of May 19, 1857, appendix to P. L. 1858, page 687, provides that councils may, from time to time, by ordinance, establish such regulations in regard to said railway as may be required for the paving, repaving, grading, culverting, and laying water and gas pipes in and along said street, and to prevent obstructions thereon.

The preamble, if it may be regarded as explaining the true purpose and object of the ordinance of June 21, 1873, recites that the tracks of the two companies are so laid as to occasion inconvenience to the business men on Market street, and to others having occasion to use the same. This in effect declares the tracks as now laid to be an obstruction to the business of the street. But it is not that kind of obstruction contemplated by the twelfth section of the charter of the company, which the city, by this grant of express power, is authorized to remove. Ordinances passed under this section could only prescribe regulations in relation to the road, in connection with laying pipe, etc., and to prevent obstructions thereon, on the railway. This evidently has reference to the travel of wagons on the track in such manner as to prevent obstruction of the cars; regulate stoppages at intersections of streets; the rate or speed of travel on the road; so that cars might not obstruct the travel of other persons on the street, or by being themselves obstructed, constitute an obstruction thereon.

This is wholly distinct from the track or roadway, being in itself a hindrance or obstruction to the business of the street. That the twelfth section of the charter of the plaintiffs gives to the city power to remove obstructions from the road, and not from the street generally, is, we think, evident, from the fact, that the city needed no such grant of authority, as the defendants contend is conferred by the act of 1858. It possessed at that time most sufficient authority to clear obstructions from public highways, but when the right was conferred on the plaintiffs to lay their road on Market street, the power was reserved to the city, to legislate for the removal of obstructions from the railway, if necessary.

We do not think this point is well taken.

The defendants also ground their resistance to the application of plaintiffs, on the act of April 8, 1846, which prevents the courts in Philadelphia granting or continuing injunctions against the erection or use of any public works of any kind, erected, or in progress of erection, under authority of an act of the Legislature, until questions of title and damages shall be submitted, and finally decided by a common law court.

We think it would be straining this law beyond its true meaning, to hold that a mere change in the location of railway tracks of two private corporations upon the street can be construed to fall under the designation of "public works." Nor can it with truth be asserted that such

works have been erected, or that they are in progress of erection; for the removal and replacement of the tracks, so far from having been erected or completed, has not even been commenced. The public work contemplated and already begun, is the repaving of the street; this is to be done for the benefit of the entire community, at public cost. But if the railway tracks are to be shifted to the centre of the street, they are and will continue to be the private property of private corporations. Nor is it intended that the city shall bear the burden of effecting the change, the ordinance providing that each corporation shall be compelled to reimburse the city, if the outlay is, in the first instance, required to be paid out of the treasury of the municipality. That the work may be done by the agents of the city, if done for individual corporations, does not make it public work or public property; it remains the property of private owners. We do not agree with the plaintiffs, however, that because the work is not done under a special act of the Legislature, that it is wanting in sufficient legislative authority, if there is in the act of incorporation of the city, or its supplements, to be found a grant of general power, sufficient to authorize them to remove the plaintiffs' tracks of railway. It may, in such case, be properly said to be done under the authority of an act of the Legislature.

This brings us back to the question, is the proposed interference by councils with the right of plaintiffs to continue to use their road as now constructed, justified by the law of necessity? Is the ordinance a reasonable and proper ordinance? Nor must it be forgotten that all that is proposed to be done, is to regulate the enjoyment of corporate franchises, not to destroy them, as was done by the action of the building commissioners taking absolute possession of the road between Juniper and Merrick streets. The ordinance does not aver that the tracks of the railway of the plaintiffs as they have heretofore existed, or that their use by the company plaintiff, have, or do now of themselves occasion inconvenience, to any portion of the public; but it is asserted that they do so in connection with the tracks of the Union Passenger Railway. This is not such an averment of inconvenience or obstruction as we can consider as at all conclusive of the fact itself. If the hardship recited in the ordinance be not occasioned by, or is not properly chargeable upon the plaintiffs, but by something which another has done, it is much more reasonable, and it is every way proper, to first endeavor to cure the existing evil by removing its cause, and not inflict punishment upon those who have not offended. If the removal of both tracks of railway from their present location nearer to the centre of the street is a public necessity; if common benefit or general advantage demand it, let it be done as councils have ordained; but if the whole of the inconvenience arises from the fact that the Union Passenger Railway have, without a necessity to justify it, exercised their right to lay their tracks upon Market street in such a manner as to have occasioned all the mischief, then the evil ought to be abated by the removal of their tracks to another portion of the highway. A personal inspection of the street has satisfied us that this can be done, and if in this we are mistaken, we hold ourselves open to correction, and to such a modification of the order, which we propose to make, as may appear proper under the circumstances of the case. Between Eighth and Ninth streets the north track of the

Union road can be laid near the centre of the street, and south of the northernmost track of the plaintiffs, connecting with the Union track, as now laid, at the intersection of Ninth and Market; this will take away, as it appears to us, all cause of objection west of Eighth street. And on the south side of Market street the inconvenience can be removed by placing the southerly track of the Union road north of the southernmost track of the roadway of plaintiffs. There appears to be ample space in the centre of the street for this readjustment of tracks, except for a short distance west of Third street. But this difficulty can be obviated by straightening the track of plaintiffs on the south side of Market street west of Third, so as to make the space between the tracks of the Market street road uniform from Third to Seventh streets. The Union road can cross the track of plaintiffs at the intersection of Third and Market streets to connect with their track as now laid from Third street, east.

It is possible that it may be necessary, if this plan is adopted, that the Union track must cross that of the plaintiffs west of Eighth street; if this is found to be the case, and if the connection cannot be made at the intersection of Eighth and Market, then I shall require the plaintiffs to agree to such a crossing of their track at this point, or if they do not concede this, I will dissolve the injunction so far as it applies to the street between Eighth and Ninth streets.

This arrangement, if practicable, renders unnecessary any disturbance of the plaintiffs in the enjoyment of their franchises, which they have possessed since 1858, and which they are entitled to continue to enjoy until the public benefit, or the general welfare of the community, shall justify any interference with them, by way of regulation, by the corporate authorities of the city.

Until further orders the injunction is continued.

Theodore Cuyler, Esq., for plaintiffs.

R. N. Willson, Esq., for city.

[Leg. Int., Vol. 30, p. 257.]

**WEST END PASSENGER RAILWAY COMPANY OF PHILADELPHIA vs.
THE PHILADELPHIA CITY PASSENGER RAILWAY COMPANY *et al.***

The act incorporating the defendants authorizing them to extend their road *at any time*, repeals the 19th section of the act of 1849, as far as it applies to them.

Motion for a special injunction. Opinion delivered *August 5, 1873*, by PEIRCE, J.—This injunction is asked for to restrain the defendants from constructing a railway on Lancaster avenue, upon the grounds that they have no authority in law for the construction of their proposed railway, and that it will interfere with the rights and franchises of the plaintiffs, who are authorized to lay a railway on a portion of said avenue.

Since the recent decisions of the Supreme Court, in the cases of the *Union Passenger Railway Company vs. The West Philadelphia Passenger Railway Company*, and in the matter of the opening of Fifteenth and Sixteenth and Norris streets through Monument Cemetery, it is difficult to say what is and what is not a violation of Article XI., Section 8, of the Constitution of the State, which declares that “no bill shall be

passed by the Legislature concerning more than one subject, which shall be clearly expressed in the title, except appropriation bills."

In the light of the last decision of the Supreme Court, that of the Monument Cemetery matter, there is certainly no such palpable violation of that article of the constitution in the acts of assembly complained of in this case as would justify a court not of final resort in pronouncing them unconstitutional on a motion for a preliminary injunction.

The next objection of the plaintiffs is, that the fourth section of the supplemental act of April 13, 1868, gives no authority to the defendants to construct the railway proposed by them. That section is as follows, viz.: "Section 4. That the said company shall have the right to extend their road at any time from its present terminus in the city of Philadelphia to any other point in said city west of the river Schuylkill."

The power granted by this section is undoubtedly large. But is it beyond the scope of authority or power vested in the Legislature? No constitutional objection to such a grant of power has been shown, and until such is shown, or may be fairly inferred from some of the limitations of power imposed upon the Legislature, it must be presumed to be lawful.

But it was urged that the right of the defendants to extend their railway under said fourth section was in violation of section 19 of the act of assembly of 19th February, 1849, (Purdon, 1221, section 42,) which enacts: "If any company incorporated as aforesaid shall not commence the construction of their proposed railroad within three years, and complete and open the same for use, with at least one track, within the term prescribed by the special act authorizing the same, or if, after the completion, the said railroad shall be suffered to go into decay and be impassable, for the term of two years, then their charter shall be null and void, except so far as to compel the said company to make reparation for damages."

But the act under which the defendants claim the right to build their extension repeals the 19th section of the act of 1849, so far as it applies to them, or excepts them out of its provisions, by declaring that they shall have the right to extend their road at *any time* from its present terminus in the city of Philadelphia to any other point in said city west of the river Schuylkill.

That it was competent for the Legislature to do this cannot be doubted. A previous Legislature cannot control the acts of a subsequent Legislature in matters within the scope of the legislative authority not prohibited by the constitution.

The last objection to be considered is, that, by the plan adopted by the defendants, their tracks on the north side of Lancaster avenue, from Thirty-eighth to Fortieth street, and on the south side from Forty-first to Fortieth street, will be laid on and will occupy the identical part on which the plaintiffs are authorized and empowered to lay their tracks, and on which they are about to lay the same.

It seems that both plaintiffs and defendants are alike authorized by the board of surveys to occupy the particular parts of Lancaster avenue above referred to.

If there be a harmonious feeling between the parties this will injure neither of them; they can jointly occupy the same track for the limited

space referred to, while it will be greatly conducive to the public welfare that the avenue shall be as free from unnecessary tracks as possible.

Until it can be shown that the plaintiffs will be injured by such a joint occupation of the highway, and that they have a right to the exclusive occupation of that portion of it, the defendants ought not to be interfered with in laying their tracks, as approved by the board of surveys.

The interests of the public as well as the rights of the railway companies are to be considered in the manner of the use of the great public highways, and if these rights and interests can be made to coalesce, it is the duty, not only of the board of supervisors, but of the courts, to give them the sanction of their approval.

For these reasons the special injunction prayed for is refused.

George W. Thorn, Esq., for plaintiffs.

Robert N. Willson, Esq., and *Hon. F. Carroll Brewster*, for defendants.

[Leg. Int., Vol. 30, p. 312.]

AGNEW *et al.* vs. WHITNEY.

1. A boiler held to be "an alteration or improvement" which by the terms of the lease were not to be removed by the tenant.
2. A parol license contrary to the written terms of the lease should be clearly proved.

Opinion delivered *September 20, 1873*, by

PAXSON, J.—The *ex parte* injunction heretofore issued in the above case must be continued for the reason that the boiler, which the defendant proposes to remove, clearly comes within the terms of the fourth section of the lease, wherein it is provided that in case the tenant should "make any alterations or improvements of the said premises and appurtenances demised, the same are not to be removed by him, but shall belong, and be surrendered to the lessor at the end of the term." The boiler in question was used for the purposes of the brewery, and was certainly an alteration or improvement; perhaps both.

It is true the defendant sets up a parol license to remove the boiler. In the face, however, of the positive prohibition of the lease, such license should be very clearly made out by competent evidence. If, as was alleged, the boiler cost upwards of four thousand dollars, it was certainly very remiss in the lessee not to have procured the assent of the lessor in writing to its removal. The latter is now dead, and it is sought to establish the alleged parol license by the affidavits of the original lessee and his assignee. It is at least doubtful, whether, under the act of 15th of April, 1869, Purdon, 624, pl. 16, either of these gentlemen is a competent witness as to any admissions or agreement of the deceased lessor. But without deciding what is not necessary for the purposes of this motion, I am clear in my judgment that in view of the fact that the lease prohibits the removal of this boiler, the defendant should be enjoined until his right thereto is established in a judicial proceeding.

The injunction is continued until the further order of the court.

George Junkin and *M. J. Mitcheson, Esqs.*, for plaintiff.

W. S. Price, Esq., for defendant.

[Leg. Int., Vol. 30, p. 321.]

THOMAS vs. ABBOTT.

Sale of land—Injunction to restrain payment to legal owner.

Opinion delivered *September 29, 1873*, by

PAXSON, J.—The affidavits in this case fully establish the fact that the defendant, Thomas T. Smiley, is a *bona fide* purchaser without notice. We cannot, therefore, interfere with his rights as purchaser of this property. It remains to consider whether we shall restrain him from paying over the purchase-money to the defendant Abbott. This can only be done upon the ground that the plaintiff is entitled to an interest in the land, which interest will be put in jeopardy by such payment.

The affidavits of the defendants flatly deny this interest. Indeed, they allege a disclaimer thereof by plaintiff. The latter, however, claims that the agreements, copies of which are attached to his bill, sufficiently disclose the fact that he was a copartner in the land as well as in the building operations. The two agreements of July 1, 1870, must be read together, and construed subject to the prior agreement of April 1, 1870. By the latter, Abbott was to convey three-fourths interest in the land referred to, to the parties therein named, upon the payment of the purchase-money, forty-eight thousand dollars; or to convey any part thereof upon the payment of the proportional price thereof. The purchase-money has never been paid, and Mr. Abbott never parted with the legal title, except as to the two and a half acres, upon which the houses have been erected. The interest of the plaintiff is clearly defined in the agreement of July 1, 1870, in these words: "That the aforesaid William B. Thomas shall have and receive one undivided one-fifth interest in the net results derived from the sale of houses and lots, and in the increased value of a certain tract or parcel of land located in the Twenty-eighth ward of the city of Philadelphia, containing thirty-four acres, more or less," etc. The interest referred to is in the net results of sales and the increased value, which can only be ascertained by a sale of the property. Beyond this Thomas has no interest. As the other parties have released their interest in favor of Mr. Abbott, virtually abandoning the whole enterprise, I see no equity in the plaintiff to prevent the former from making sale of the property in question. The interest of the plaintiff can still be protected. That interest, at most, is one-fifth of the surplus remaining after Abbott has been paid his forty-eight thousand dollars. I do not see that this is very important, in view of the facts that the property, after paying liens, will not realize the above sum. But if deemed material, the injunction may be modified so as to restrain the defendant, Smiley, from paying over this interest to Mr. Abbott, and so modified, continued. In which event a receiver will have to be appointed to hold the same subject to a settlement of accounts.

With these views as a guide the learned counsel may be able after consultation, to agree upon a form of decree which will meet the exigencies of the case.

R. P. White, Esq., for plaintiffs.

John R. Read and Silas W. Pettit, Esqs., for Abbott.

George Northrop, Esq., for Smiley.

[Leg. Int., Vol. 30. p. 321.]

FRICK & SNYDER vs. GLADDINGS, Owner, and FRANKLIN CASSELL, Contractor.

A mechanics' lien cannot be stricken off by petition based on questions of fact not arising upon the record.

Mechanics' lien claims. Opinion delivered *September 29, 1873*, by FINLETTER, J.—The defendants filed their petition praying the court to strike off the liens.

The petitioners aver that they entered into a contract in writing with Franklin Cassell for the erection of three houses for a specific sum. That agreeably to the act of assembly the said contract was acknowledged before a proper officer, of this Commonwealth, authorized by the laws thereof to take acknowledgments of deeds, and duly recorded within fifteen days after the execution thereof.

The act of April, 1872, is as follows: "That when any building or buildings shall be erected in whole or in part by contract in writing, such building or buildings, and the land or lands whereon it or they stand, shall be liable to the contractor alone for work done, or materials furnished."

It is not contended that the liens are defective in form or substance. It is, however, argued, that no right to lien existed under the circumstances in any one but the contractor, Cassell; that the plaintiffs' claims are therefore irregular and void, and should be stricken off.

It is too well established to require citation of authorities that upon petition or demurrer the court may strike from the record mechanics' liens which are defective. The questions which are raised in such cases are questions of law, and properly triable by the court and not by the jury.

The cases which establish this principle indicate that no question of fact can be determined by the court, and therefore cannot be determined upon petition or demurrer.

Whether the defendants contracted with Cassell in writing, and whether the contract was duly executed and recorded, and other matters, are questions of fact not arising upon the record, which the court cannot determine; and which the plaintiffs have a right to have determined, as all facts are, by a jury.

In *Lee vs. Burk*, 16 P. F. S. 336, Justice Sharswood has carefully elaborated and discussed this whole subject in the light of all the authorities. He says: "The plaintiffs had a right to accept the issue rendered of 'no lien,' as an issue of fact, because it might well be that for some cause *dehors* the record there was no lien; as that the claim had not been in fact filed within six months after the work done or materials furnished. That the work was not done or the materials furnished upon the credit of the building; that the plaintiffs had bound themselves to file no lien; or that the building was not such a one as was within the acts of assembly; and there may be other defences coming under the same category."

Rule discharged.

[Leg. Int., Vol. 30, p. 321.]

LINGERFIELD *et al.* vs. GEORGE.

Judgment taken before alderman on March 24, bail for appeal entered April 10, and the appeal not filed in court till May 3, held in time.

Opinion delivered *September 29, 1873*, by FINLETTER, J.

Rule to show cause why appeal should not be stricken off.

March 24, 1873. Judgment entered by the alderman.

April 10, 1873. Defendant entered bail, etc., for appeal.

May 3, 1873. Defendant filed his appeal.

It is contended in support of the rule that as the judgment was entered March 24, the monthly return-day next ensuing this date was the first Monday of the following April; and that it was too late to file the transcript after that day. In other words, that the computation of time within which the appeal must be filed, should be from the rendition of the judgment.

The argument is based upon the peculiar phraseology of the act of May 1, 1861, which is as follows: "That all appeals from aldermen as aforesaid shall be filed in the Court of Common Pleas of the city and county of Philadelphia, *on or before the monthly return-day* in said court next ensuing *the date of the judgment* before the alderman, instead of to the first day of the next term as heretofore."

We do not think this position well taken. By the act of 1861 no appeal can be had until the affidavit has been filed. This is an additional restriction upon the right of trial by jury, and should not be allowed by implication to destroy altogether that right, or to take away or abridge the time within which appeals under existing laws might be entered. It is not asserted that the act of 1861, in express terms, repealed the act of 1823, which gave twenty days after the judgment within which to enter bail to appeal; or that such was the object. We must, therefore, give such construction to this act as will make it in harmony with the act of 1823.

It is clear that the act of 1861 was not intended to operate upon the time in which an appeal could be taken, for upon that subject it is significantly silent. It is equally clear that its sole purpose was to prevent delay and litigation not based upon supposed right. The first section, therefore, provides that "no appeal shall be allowed unless the defendant shall make oath or affirmation that the same is not intended for delay merely." The effect of this section is to prevent any delay not meritorious. The second section was designed to give, and does give, the litigants an earlier opportunity to have their disputes settled. It makes the return-day, before or upon which the appeal may be entered, monthly, instead of quarterly. It supplements and perfects the first section, and both work together to obtain "speedy justice." The object is not inconsistent with the existing law, which gave twenty days for appeal. Nor is it in conflict with, or inimical to, appeals which are not "for the purpose of delay merely."

Rule discharged.

J. Q. Hunsicker, Esq., for defendant.

[Leg. Int., Vol. 30, p. 344.]

CASE OF GEORGE WIDMIER, an Insolvent Debtor.

1. An insolvent debtor will be discharged, although it is opposed because he was arrested on process on a judgment in an action for *actual* force, if the court by going behind the judgment ascertain that the cause of action was *not* founded on actual force.
2. If an insolvent petitioner omits to return a debt due to him from an honest conviction of its worthlessness, it will not defeat the petition.

Opinion delivered *October 18, 1873*, by

ALLISON, P. J.—The petitioner, George Widmier, prays to be discharged as an insolvent debtor. This is opposed on the ground that he was arrested on process founded on a judgment against him, in an action for *actual* force. The affidavit to hold to bail, and the declaration founded thereon, charged, that defendant did break and enter the stable and close of the plaintiff, and then without the leave, and against the will of defendant, one mare of the value of \$200 seized and carried away. If the force mentioned in the affidavit was *actual* force, the defendant cannot be discharged until he has been in actual confinement for at least sixty days; this is required by the 17th section of the act of 16th June, 1836, relating to insolvent debtors. In *Ex parte Southerland*, 17 Amer. L. R. 39, it was held, that the court will look behind the judgment, to ascertain the real cause of the action, in order to determine the question of the right of a petitioner to a discharge. This must be so; otherwise it would be in the power of the pleader to determine the question, by the statements of the affidavits and narr. In this case force is charged, but the question remains, was it *actual* force? To enter the close of another without permission, constitutes trespass, and to open a fastening of a close, if it be no more than to lift a latch, or to let down bars, amounts in law to an unlawful breaking with force, etc. But this is not *actual* but *technical* force, and does not fall within the restriction upon the right to a discharge covered by the act. The distinction between *actual* and *constructive* force is clearly recognized in the law; as in forcible entry and detainer; the force must be such as to put one standing in defence of possession, in fear of personal injury; and the force to invalidate a marriage must amount to *duress per minas*: *Stevenson vs. Stevenson*, 7 Phila. Rep. 386. The same rule of construction was applied to the words "*actual* fraud," which, in the act of 1836, are coupled with the words *actual* force, *In re Thomas H. Craig*, 2 Phila. Rep. 391, where the judgment was in an action founded upon a breach of promise of marriage.

The examination of the petitioner by the judgment creditor, who opposes the discharge, shows the force to have been *technical*, and not *actual*, and this established, the objection falls out of the case.

There is more force in the objection, that the conduct of the petitioner gives rise to a presumption of fraud, having stated in his petition that he has no property of any kind except his personal clothing. He admitted in his answers at bar, that he has claims against several persons, one amounting to over \$500, and that after filing his petition he brought suit before an alderman, against Brotz, who opposes the discharge, to recover \$90, for money loaned. All the claims except that

against Brotz, he says, are worthless, because of the insolvency of the persons indebted to him. And this did not seem to be disputed by the opposing creditor. In the case of *William G. Oliver*, 1 Ashmead, 112, Judge King held, that where a petitioner omits to return a debt due to him, from an honest conviction of the worthlessness of the claim, which rendered its return useless, it will not defeat the petition. The property not returned in Oliver's case, amounted to over \$20,000, but because it was without value, and fraud was not made to appear, the petitioner was discharged. In the suit brought against Brotz, who contests the validity of the claim, there is no just ground for an inference of fraudulent concealment of property; the bringing of the suit of itself answers the charge of concealment; it was the most direct notice to Brotz, and constructively to all creditors; if established it could not pass to the petitioner, but to his assignee for the benefit of creditors. In Oliver's case, Judge King says: fraudulent concealment of his property by an insolvent, is a most heinous crime, and like all other crimes, its actual and positive commission must be brought home to the party charged; and that an omission to spread upon the petition all the lights which a creditor may fairly demand, in the absence of a fraudulent design, cannot subject a suitor to the perils of a penitentiary.

A fraudulent intent is not, I think, established against the petitioner in the case under consideration; it is therefore ordered that the petition be amended by inserting a list of his claims against those alleged to be indebted to the petitioner, and upon this being done, that he be discharged.

George H. Earle, Esq., for petitioner.

S. N. Rich, Esq., contra.

[Leg. Int., Vol. 30, p. 344.]

PETITION OF JOHN L. THOMAS, for discharge as an insolvent debtor.

The State court has not authority to discharge an insolvent debtor arrested upon process issued out of the United States Circuit Court upon a judgment founded upon a fraudulent representation alleged to have been made by the petitioner.

Opinion delivered October 18, 1873, by

ALLISON, P. J.—The most important question to be considered in this case, is presented upon an objection to the discharge of the petitioner, on the ground of a want of jurisdiction in the Court of Common Pleas to make the order prayed for.

John L. Thomas was arrested upon process, issued out of the Circuit Court of the United States for the Eastern District of Pennsylvania, upon a judgment, founded upon a fraudulent representation alleged to have been made by petitioner, to William D. Russell, a citizen of the State of New Jersey. The point seems to be conclusively settled against the application, in the case of *Duncan vs. Klinefelter*, 5 Watts, 141, in which it is decided, that State laws have no operation *proprio vigore* upon the process or proceedings of the courts of the United States. And that a judge of a State court cannot discharge from arrest, under the insolvent laws of the State, one who is in custody upon process from the United States Court.

In the opinion of the Supreme Court, it is distinctly asserted, that the

acts of assembly relating to insolvent debtors applies only to debtors held under executions, issued from the State courts. A number of cases are cited by Judge Sergeant, decided by the Supreme Court of the United States, sustaining the principle upon which *Duncan vs. Klinefelter* is rested.

In *Beers vs. Houghton*, Supreme Court of United States, January term, 1835, a discharge was held to be proper, which was obtained under a rule, established by the judge of the Circuit Court of the District of Ohio, which was made under the *proviso*, in the third section of the act of Congress of 1828: the rule provided, that under neither mesne nor final process, should any individual be kept imprisoned, who, under the insolvent laws of the State, had for such demand, been released from such imprisonment.

A rule has also been made by the United States courts for the Eastern District of Pennsylvania, which recites, that the act of Congress of February 28, 1839, chapter 35, having provided, that where, by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same shall be applicable to process issuing out of the courts of the United States. The material provisions of our act of 16th of June, 1836, are then recited, and it is ordered, that in all cases in which a party could be discharged by the State court, under the act of assembly of 1836, he shall be discharged if held under the authority of the United States Court, upon *similar* compliance with the provisions of said act; and that to that end, all the proceedings and powers, which under the first eight sections of the said act of assembly may be had and exercised before a judge of the Court of Common Pleas, may be had and exercised by and before either of the judges of the United States Courts of the Eastern District of Pennsylvania.

We think it is clear that this rule does nothing more than give effect to the act of Congress, which makes applicable to process issuing out of the courts of the United States, the State laws relating to discharge from imprisonment for debt. The debtor is obliged to make *similar* compliance to the requirements of the act of 1836, when held on process out of the United States courts, that he must make to its provisions, in the State courts as a prerequisite to a discharge; and it distinctly looks to the exercise of like powers and the making of like orders and decrees, which the judges of the Common Pleas may exercise and make.

We have been unable to discover after careful examination of this rule, that it even proposes to confer on the Court of Common Pleas, jurisdiction in a case where the debtor is held under a process issued by the courts of the United States. Nor have we been able to find in the act of Congress, on which the rule is based, a delegation of power which would authorize the courts of the United States by rule or otherwise to send individuals arrested by process of the federal courts into the State courts, to be there heard upon an application for discharge from arrest. The act of Congress, and the rule of court to which our attention has been called, contemplate clearly in our judgment, conformity in the federal courts, with the legislation of Pennsylvania and the adjudications thereon, upon questions relating to the discharge from arrest. But if the rule contemplated more than this, and could have given to it the interpretation for which the petition contends, or if in

express terms it provided for a transfer of application for discharge to the Common Pleas, there would be abundant reason to justify us in declining to take jurisdiction of such cases, because there is full power in the courts of the United States to dispose of applications of their own suitors, by conforming to the laws of the State of Pennsylvania in regard to insolvent debtors.

Petition dismissed.

D. W. Sellers, Esq., for the petitioner.

Nathan H. Sharpless, Esq., contra.

[*Leg. Int.*, Vol. 30, p. 352.]

WOOD et al. vs. MAITLAND et al.

One of several executors has the right to sell stock of his testator, and if he does actually agree to sell, and the price is paid, title passes—but one who deals with another holding a certificate with a power to sell and transfer, signed by the executor, does not obtain a valid security for a loan by the delivery of such certificate and power, unless as matter of fact, there had been a sale and payment of the price, so as to divest the title of the decedent.

Until actual transfer, the title of the purchaser of stock is merely equitable, and persons dealing with him, take the risk that the equitable title is such that he can compel a transfer of the legal title.

In equity. This was a motion to continue a special injunction.

Charles S. Wood died in May, 1873, being the owner of a number of shares of stock of the Cambria Iron Company, which stood in his own name. By his will he named four executors, all of whom took out letters.

George R. Wood, one of the executors, delivered a certificate for 1,905 shares of this stock to McDowell & Wilkins, brokers in this city, with a power of attorney in the usual form reciting a sale to —, and authorizing — as his attorney to sell and transfer the shares to —. This was signed by him as acting executor.

McDowell & Wilkins borrowed from Maitland & Audenreid, \$9,000, and as collateral for the loan, agreed to give, and did give them this certificate and the accompanying power of attorney.

The other executors discovering the fact, filed a bill to have the certificate returned to them and for an injunction to restrain the transfer.

The motion was argued on Friday last. For the motion it was urged that the legal title to the stock was in the testator, and nothing was shown to displace that but an authority to sell which had never been executed in fact. And that lenders on stock took the risk, that the person they received it from, had a title or authority to deal with it in this way. That as the executor could not pledge for such a debt, it lay on him to show that some one had by purchasing under the power acquired a title which he could lawfully use as a pledge.

For the defendants it was argued that it was admitted that an executor could sell the stock, and the authorities all agreed that a sale and payment of the price, and delivery of the certificate with a power to transfer, passed a perfect title as against execution creditors. As Maitland & Audenreid had undoubtedly given value and no fraud was charged, they had thus acquired the title. At all events, they had

certainly got the shares of the executor as a legatee, and this being so, the executors could not deprive them of the security, without redeeming.

Opinion delivered *October 28, 1873*, by

PAXSON, J.—The facts of the case, briefly stated, are as follows: Charles S. Wood died on the 27th of May, 1873, leaving a last will and testament, of which R. Francis Wood, George R. Wood, John N. Packard, and Charles S. Wurtz, were the executors named therein. Letters testamentary were issued to all of the said executors. At the time of his death the said testator was the owner of 20,385 shares of the capital stock of the Cambria Iron Company, the par of which is \$12.50. Said stock is said to be worth considerably more than par, and to have paid 12 per cent. dividends for several years. George R. Wood, one of said executors, a defendant in this suit, for the purpose of securing a liability of his own to defendants, McDowell & Wilkins, who are partners as stock brokers in this city; and of aiding the latter in securing liabilities of their own to E. V. Maitland and William W. Audenreid and others, delivered to the said McDowell & Wilkins divers certificates of the Cambria Iron Company, for stock of said company, held by or in the name of the said testator, together with as many powers of attorney signed by him, the said George R. Wood, as "acting executor" of Charles S. Wood, authorizing the transfer of the same by a person not named in the powers. One of these certificates, to wit, one for 1,905 shares, with the power of attorney to transfer the same, was given by McDowell & Wilkins to Maitland, Audenreid & Co., on the first day of October, 1873, to secure a loan of \$9,000, made on that day by the last named firm to said McDowell & Wilkins. The said shares have never been transferred on the books of the Cambria Iron Company. It is to prevent said transfer, and to restrain the said defendants, who are the holders of said certificate and power of attorney, from transferring or parting with the same that this bill has been filed.

The method of acquiring title to shares in incorporated joint stock companies is a subject of very grave importance. This species of property has multiplied to such an extent that a very large proportion of the capital of the country is invested in "shares." The daily transactions therein in our large commercial and moneyed centres are of great magnitude. Certificates and powers of attorney, representing immense sums of money, invested in such securities, pass from hand to hand with almost the rapidity and ease of commercial paper, or money itself. It will thus be seen that the manner in which this species of property may be transferred is a matter of no inconsiderable interest.

The character of this kind of investment has been too well settled by legislative enactment and judicial construction to need discussion. While shares in a stock company are personal property, they are not strictly speaking chattels. It has been considered that they bear a greater resemblance to choses in action; or in other words, they are merely evidence of property: *Angell & Ames on Corporations*, Chapter XVI., section 560. They are, it has been said, mere demands of the dividends as they become due, and differ from movable property, which is capable of possession and manual apprehension: *Denton vs. Livingston*, 9 Johns. R. 96; *Wildman vs. Wildman*, 9 Ves. R. 177. There can

be no such thing as an actual delivery of the shares. It is a general rule of law, that when a thing is intangible and incapable of actual delivery, there may be a symbolical delivery. The legal title of shares in a stock company can only be evidenced, and a transfer made, in writing. A certificate of stock may, however, be transferred by a blank indorsement, which may be filled up by the holder, by writing an assignment and power of attorney over the signature indorsed: *Kortright vs. The Buffalo Commercial Bank*, 20 Wend. (N. Y.) R. 91; Angell & Ames, above cited. It follows that a power of attorney, signed in blank, is sufficient to enable the holder to make the transfer. The delivery of such a power is an implied authority to fill up the blanks: *The Building Association vs. Sendmeyer*, 14 Wr. 67. A person being the owner of shares of stock may sell, give away, or pledge them as he may any other article of personal property. The sale thereof, with receipt of the purchase-money and delivery of the certificate, with a power of attorney to transfer, passes the full equitable title and entitles the holder to demand the legal title. A person who purchases stock from the owner, or his duly authorized agent, has only to see that the vendor is owner of the same, and is entitled to a transfer by the rules of the company. The rule is different, however, when a person is acting in a fiduciary capacity. The principle may be generally stated that when one offers for sale the stock of another, the purchaser is bound to see that the former has authority to make the sale. A trustee has no such general power. His office is to hold and safely keep the trust funds in accordance with the terms of the will, or other instrument creating the trust: *McMurtrie vs. The Penna. Co.*, Legal Intelligencer, vol. 29, p. 108. A trustee may be authorized to sell by the terms of his trust or by order of the court; but the purchaser must see to this at his peril. An executor or administrator stands upon a different footing. His office is to administer the assets. This includes a power of sale; but even in the case of an executor, the stock in question may be specifically bequeathed, or there may be a special trust thereof.

In this case I do not find anything in the will of Charles S. Wood, limiting the general power of sale incident to the office of executor. The executors had an undoubted right to make sale of this particular stock. Nor is there anything in the fact that the power of attorney was signed by but one of the executors. He signs as "acting executor," a term not unfrequently used, yet difficult of a precise legal meaning. It would seem to apply, if at all, to the case where only one executor has taken out letters testamentary. The law is well settled in this State, that executors may sever, may file separate accounts, and that one executor, separately acting, may convey personal property, as if all had joined: *Hall vs. Boyd*, 6 Barr. 270; *Irwin's Appeal*, 11 Casey, 296; *McNair's Appeal*, 4 Rawle, 156; *Richardson vs. Richardson*, 9 Barr, 430; *Doebler vs. Snively*, 5 Watts, 228; *Stell's Appeal*, 10 Barr, 153. It follows that if George R. Wood, executor, sold the stock in question to McDowell & Wilkins, and received the consideration therefor, it was a valid sale and passed the title.

In order to determine the rights of the present holders of these shares we must examine, first, the transaction between Mr. Wood and McDowell & Wilkins, and second, between the latter and Maitland, Audenreid & Co.

Assuming the facts as before stated, and as they appear upon bill and affidavits, it is clear there was no sale by the executor to McDowell & Wilkins. It was a mere pledge of the stock for an antecedent debt of the executor. In this age of defalcations and misappropriation of trust money, extending through national, State, and municipal affairs, as well as those of private corporations and individuals, carrying in their train losses to public and private interests, as well as wide-spread distrust and alarm to all classes, I cannot designate this transaction as an indiscretion. It was a fraud; a deliberate attempt to use money held upon a sacred trust for the personal ends of the executor. That McDowell & Wilkins, who received their shares from Wood, knew of this misapplication, is apparent from the face of the papers. The latter disclosed the fact that the stock belonged to the estate of Charles S. Wood. The brokers knew that the executor was pledging the stock for his own debt. As between these parties the transaction was illegal, and McDowell & Wilkins took no title to the stock.

It remains to consider the case as between McDowell & Wilkins, and Maitland, Audenreid & Co. The latter disclaim all knowledge of any defect in the title.

It is an undoubted principle of equity that the owner of property may follow and reclaim it wherever he can find and identify it, until arrested in the pursuit by the countervailing equity of a *bona fide* purchaser for a valuable consideration paid. A purchaser with notice that the sale is a breach of trust, or a fraud upon the rights of the real owner, is *particeps criminis* with the fraudulent vendor, and his purchase cannot protect him against the owner, because such purchase is not *bona fide*: *Garrard vs. Pittsburgh & Connellsville Railroad Company*, 5 Casey, 154. Whatever is sufficient to put a party upon inquiry, is in equity held to be good notice to bind him: *Id.* Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact: 3 Foulb. Equity, 303, chap. 3, § 1, note (b).

The application of these familiar rules of equity to the facts of this case is not difficult. This stock belongs to the estate of Charles S. Wood. Equity will follow and reclaim it until it is arrested in such pursuit by the finding of the stock in the hands of a *bona fide* purchaser without notice. By purchaser is meant one who has in good faith paid the consideration money. Are Maitland, Audenreid & Co. such purchasers?

They allege that they took this stock as collateral for a loan made to McDowell & Wilkins. They do not pretend to have bought it. Having taken but the equitable title, they are affected with notice of all such facts as lie in the line of the legal title. The papers which they hold as evidence of their equitable title, disclose the fact that the stock in question belongs to the estate of Charles S. Wood. Also the fact that the said George R. Wood is one of the executors. Further, that the said executor has executed a power of attorney authorizing an attorney, not named, to sell the stock and transfer the same, with a blank for the name of the purchaser. Do these facts furnish conclusive evidence of a sale? On the contrary, the non-transfer of the stock to a purchaser, and the unfilled blanks are circumstances to put the purchaser upon his

guard, and are notice to him that the transaction was *in fieri*. The power has never been executed. Such power is subject to revocation, and this, notwithstanding present words of bargain and sale. It is true it may not be revoked after an actual sale and payment of the purchase-money, for this is an execution of the power.

Maitland, Audenreid & Co., being merely the holders of an equitable title, were bound to inform themselves what would be necessary to perfect it, and obtain the legal title. Such inquiry, properly prosecuted, would have led to information of the fact that there never has been a sale of this stock, and that the title thereto remains in the estate of Charles S. Wood.

It was urged upon the argument by the learned and able counsel for the defendants, that inasmuch as the interest of George R. Wood in his father's estate would exceed the amount of the stock so misapplied, the equities of the case could be reached by allowing the stock to remain in the hands of the brokers, and setting it off against his share of the estate. The argument is ingenious, but unsound. The course indicated would amount to a partial distribution of the estate of Charles S. Wood in advance, without sufficient information or proper parties before us. Our decree in such case would not bind absent parties. We can only know what the share of George R. Wood in his father's estate will be, when the executors settle their account in the proper office.

The injunction heretofore granted in this case is continued until the further order of the court.

Joseph B. Townsend and R. C. McMurtrie, Esqs., for plaintiffs.

*William L. Hirst, Esq., for defendants.**

[Leg. Int., Vol. 30, p. 368.]

GUARANTEE CO. vs. DE COURSEY.

A certiorari is not a supersedeas to a writ of possession issued upon proceedings under the act of March 21, 1772.

Opinion delivered November 8, 1873, by

ALLISON, P. J.—In the case of *Connelly vs. Arundell*, 6 Philada. Rep. 38, we decided, that the act of March 24, 1865, P. L. 750, is a repeal of the act of the 14th of December, 1863, in so far as that act directs the justice, if he shall enter judgment in favor of the landlord, to *forthwith* issue his warrant to immediately dispossess the tenant: And as the act of 1865, which makes the certiorari a supersedeas, and allows ten days from the date of the judgment, within which the writ may be taken out, that no warrant of possession can be issued by the justice, until the ten days had expired.

The case now before us is a proceeding before two justices and a jury of twelve freeholders, under the act of 21st of March, 1772, to obtain possession of demised premises, after an alleged expiration of a term, and the question now presented for decision is as to the right of the justices, to issue a writ to place the landlord in possession, immediately following a judgment in his favor; or in other words, whether the act of 1865, in so far as it relates to the certiorari, is applicable to the act of 1772. The act of 1865 provides, that in every proceeding or suit brought in the city of Philadelphia, under any of the several acts of this Commonwealth, by land-

* This case is now in the Supreme Court, and will be argued in 1880.

lords to recover possession of property leased for a term of years, or from year to year, in which a certiorari is now allowed, the said certiorari shall be a supersedeas, and the execution upon the judgment in said suit or proceeding shall be suspended, until the final determination of the proceeding by the court out of which the same issues. It is argued by the defendant, who having been dispossessed by the justices, now applies for a writ of restitution, that the true intent and meaning of this act is, to give to a certiorari the effect of a supersedeas, and also to allow ten days within which it may be taken out, in every suit or proceeding in the city of Philadelphia, by a landlord, to obtain possession of a property, leased for a term of years, or from year to year. The plaintiff on the other hand contends, that the effect given to a certiorari by the act of 1865, is restricted to such of the acts of assembly as in express terms allow the writ to issue. These are the acts of December 14, 1863, and of April 1, 1830, the first of which is identical in purpose with the act of 1772, and the latter provides for the landlord a mode of obtaining possession for nonpayment of rent, before the term has expired. But in neither of these acts, although the writ is expressly allowed, was there given to it the effect of a supersedeas. A certiorari is not allowed by the act of 1772, in which relief is given to the landlord, on the expiration of a term; nor by that of March 25, 1825, where possession may be obtained, in case a tenant removes from the premises without leaving sufficient property thereon to secure the payment of three months rent, or to give security. A certiorari might, however, issue as at common law, in suits instituted under either of the last two acts of assembly, with the same effect as writs which are expressly given by the acts of 1830 and of 1863. The distinction is, that in one case it is a statutory right, and in the other it is not. We are thus brought back to the question, does the act of 1865 apply to the act of 1772?

A statute is to be construed according to its ordinary and grammatical meaning, whenever that can be done, consistent with its expressed intention or purpose; and it is only when an adherence to the grammatical sense would involve an absurdity or inconsistency, or require an interpretation, repugnant to the clear intention of the statute, that this general rule may be departed from: *Warburton vs. Loveland*, 1 Hudson & Brooke, 648, or as stated in *Dame's Appeal*, 12 P. F. S. 422, the moment we depart from the plain words of the statute, according to their ordinary meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a "sea of trouble." The words—the context—the subject matter—are to be considered equally, if not before the effects and consequences, or the reason and spirit, and yet the reason and spirit of a statute are to be kept constantly in view, as explaining, and often controlling the interpretation to be given to the words, the context and the subject matter. The portion of the act of 1865, which gives rise to the question under consideration, judged by its grammatical construction, sustains the position taken by the plaintiff; the antecedent to the word "which" is the word "acts," so that it is to be read as if the word "acts" were repeated after the word "which," and the sentence would then read, in which acts, a certiorari is now allowed. This would exclude from the operation of the act of 1865 all acts except the acts of 1830 and of 1863, which in terms allow a certiorari to issue. Nor is this construction absurd, inconsistent, or repugnant to the words

or the intention of the statute, for it is neither absurd, inconsistent, nor repugnant to anything contained in the law, for the Legislature to restrain the remedy to proceedings instituted under certain acts of assembly, and withhold it from others.

But if we look also for the reason and spirit of the statute, we find there is protection given to the tenant by the act of 1772, which is omitted from the act of 1863. Two justices supervise the proceedings, and the landlord's right to possession, if established, is by an inquisition of twelve freeholders, where the trial may be as full, and the opportunity to make defence as ample as if made in a court of law, before a judge and jury. And under the act of 25th of March, 1825, which gives a remedy where a tenant removes from the premises, without leaving goods to secure the payment of three months rent, and refuses to give security for the rent, there is good reason for withholding from him the benefit of a stay against the execution of a writ of possession. The writ cannot eject the tenant, or subject his family to inconvenience, for they are already out of possession; and the violation of an express or implied promise to occupy the premises, and guard them from injury by trespassers, takes from the tenant all equitable claim to the protection afforded by the certiorari under the act of 1865.

Nor ought we to forget that while the acts of 1772 and of 1863, which furnish cumulative remedies to landlords, are general in their operation, the act of 1865 is restricted to proceedings instituted in the city of Philadelphia. Under the latter statute, and prior to the act of 1865, summary proceedings before a single justice were frequent, and hardship and oppression of tenants were matters of constant occurrence; the tenant had to go out of possession; the appeal was not a supersedeas, nor was the certiorari. The record often showed that but a single witness had been examined upon the hearing before the justice, and as was frequently proved, his testimony related to no more than one fact in the cause, such as notice to quit, and upon such proof judgment would go against the tenant, and he was without remedy until it was too late, in most cases, to avail as a protection. So great an evil did the practice under the act of 1863 become, that the court was compelled to give what relief it could by going behind the record on allegations of fraud on the part of the magistrate, supported by proofs and reverse judgments wrongfully obtained, that writs of restitution might issue to put the tenant back in the property of which he had been unjustly deprived. It was to remedy this evil chiefly that the act of 1865 was passed, and which subsequently induced the Legislature to provide by the law of March 25, 1869, that an appeal from a judgment of a justice under the act of 1863 should be a supersedeas. No such general abuse of power has been exercised under the act of 1772. Cases of hardship have doubtless arisen under it, but they are not frequent, and the reasons for this are apparent. There is not only the greater protection to the tenant growing out of the form of procedure, but the right is also given to the tenant to stay proceedings in a contingency provided for in the act, and then the costs, which are often considerable, by reason of the inquest of twelve freeholders, which fall upon the landlord if he cannot sustain his suit, serves to check hasty or fraudulent action on his part. For these reasons we refuse the writ of restitution and dismiss the motion.

Charles S. Pancoust and Charles Gilpin, Esqs., for plaintiff.

E. Spencer Miller and Henry Wharton, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 380.]

GEORGE BRICKER vs. CHARLES GROVER & JOHN GROVER.

A grantee who takes a conveyance with full knowledge of a covenant in relation to the land made by the grantor, but not contained in the deed from the grantor to the complainant, will be restrained by injunction from a violation of the covenant.

In equity. Motion to continue special injunction. Opinion delivered November 15, 1873, by

PEIRCE, J.—The plaintiff, in 1873, by an instrument of writing under seal, agreed to purchase of the defendant, Charles Grover, the lot or piece of ground and stable, No. 3805 on the north side of Market street, west of Thirty-eighth street, in the city of Philadelphia, and a lot contiguous thereto on Thirty-eighth street, for the price or sum of nineteen thousand five hundred dollars.

At the same time a further agreement was made between the parties as follows, viz:—

In consideration of the above agreement on the part of George Bricker, I hereby agree with him that I will not at any time erect or cause to be erected on the lot of ground belonging to me, situate on the west side of Thirty-eighth street, at the distance of sixty feet northward from the north side of Market street, containing in front forty feet, and extending of that width in depth thirty feet, any stable of any kind, and I agree hereby to execute such further papers as may be necessary to secure to him my full performance of this agreement.

CHARLES GROVER, [L. s.]

Afterwards, on the 6th day of May, A. D. 1873, the defendant, Chas. Grover, by deed duly executed, conveyed the said two first mentioned properties to the plaintiff, but the deed contained no covenant or recital of the agreement not to erect a stable on the last mentioned property.

Subsequently, on the 28th of October, 1873, the defendant, Chas. Grover, conveyed the lot on which he had covenanted not to erect a stable, to his son, John J. Grover, the other defendant, for the consideration of forty-eight hundred dollars, who avers that the said lot is so valuable only for a stable, and that if he is prevented from erecting said stable, the property will be of little value to him for any other purpose. He admits that he knew of the agreement not to build a stable on this lot, but that he was advised and believes, that it is only personal in its operation against the defendant, Charles Grover, and that it is not a covenant running with the land.

The defendant, John J. Grover, is about to erect a stable on the said lot, and the bill is filed to prevent him from so doing.

It is not necessary for the purposes of this application to determine whether the covenant of Charles Grover, not to erect a stable on said lot, is a covenant running with the land, or is a mere personal obligation.

It is an important rule of equity, that a party taking with notice of an equity, takes subject to that equity. The meaning of this doctrine is, that if a person acquiring property has, at the time of acquisition, notice of a prior equity binding the owner in respect of that property, he shall be assumed to have contracted for that only which the owner could honestly transfer, viz., his interest, subject to the equity as it existed at the date of the notice. The exact extent to which this doctrine will be carried where a covenant has been made by the owner of land, the

burden of which does not at law run with the land, does not appear to be positively settled. If, however, the covenant be one respecting the land, and not purely collateral, there appears to be no reason why the doctrine of notice should not apply, or why the assignee of the land, knowing that the covenant has modified his assignee's ownership, should not be presumed to have contracted for it, subject to that modification: *Adams' Equity*, 151, 152.

It is the doctrine of a court of equity, that whatsoever is the agreement concerning any subject, real or personal, though in form and construction purely personal, and suable only at law, yet in this court it binds the conscience, and as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust: *Legard vs. Hodges*, 1 Vesey, Jr., 477.

A purchaser with notice of a previous agreement between the grantor and another, takes the land subject to the agreement: *Smith vs. Gibson*, 1 Yeates, 291.

In *Tulk vs. Moxhay*, 2 Phillips' Ch. Rep. 778, Lord Chancellor Cottenham said, that the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchased.

The remaining question is, whether the plaintiff can have an adequate remedy in pecuniary damages for breach of this covenant.

Courts of equity will decree performance of a contract for land, not because of the particular nature of land, but because the damages at law, which must be calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value; *Story's Equity Jur.*, § 716. This is the general rule, and all contracts or questions touching the enjoyment of land fall within the principle of this rule. Therefore, courts of equity will restrain nuisances affecting the permanent enjoyment of land; and repeated or continuing trespasses on land; and breach of agreements affecting the enjoyment of land.

In this case the defendant covenanted not to erect or cause to be erected a stable on the adjoining lot belonging to him. The plaintiff had been in business with the defendant, Charles Grover, on the premises sold by him to plaintiff, as keepers of a sale stable. The defendant, John J. Grover, says, that the lot purchased by him adjoining the plaintiff's property, is so valuable only for a stable. It may be readily perceived how the erection of a stable on the adjoining lot would affect the value of the plaintiff's property. But what would be the measure of damages in such a case it is not so easy to decide. It is enough that it impairs the peculiar use and enjoyment of the property which the plaintiff purchased with the covenant that the defendant, Charles Grover, would not erect a stable on the adjoining lot, and of which John J. Grover had notice when he bought the adjoining lot from his father. In such a case a court of chancery always enjoins.

The special injunction is continued.

Hon. *Benjamin Harris Brewster*, for the plaintiff.

Hon. *William A. Porter*, for defendants.

[Leg. Int., Vol. 30, p. 392.]

BACON vs. MORRIS *et al.*

A return of *nulla bona* is not sufficient to found a bill under the act of 1863, making the officers of certain corporations liable in equity for their debts.—The return must set out that no real or personal property of the corporation was exhibited to the officer, sufficient to satisfy the debt, as required by the act.

Demurrer to bill in equity. Opinion delivered November 22, 1873, by LUDLOW, J.—The defendants in this bill are the officers of "The Philadelphia Pressed Brick Works Co.," and an effort is now made to make them liable for the debts of the concern under the provisions of the act of July 18, 1863, entitled, "an act for mechanical manufacturing, mining and quarrying purposes."

If the provisions of the act have been complied with, doubtless the plaintiffs in this bill have an equitable remedy; but the act is in its nature, so far as officers are concerned, a highly penal one, and its provisions must be strictly pursued.

By the 41st section of the law, a judgment or any other creditor may file a bill in equity, 1st. Where a judgment has been recovered. 2d. Where the corporation neglects "for the space of thirty days" after a demand on execution, either to pay the amount due with officers' fees, or to exhibit to the officer, real or personal estate, subject to be taken in execution, sufficient to satisfy the same, and when the execution shall be returned unsatisfied.

The 42d section provides, that "after the execution shall be so returned," the judgment creditor may file a bill in equity, etc. Clearly the official act of the sheriff must include something more than a mere return of "*nulla bona*," for this return may be made, and yet real and personal estate of the corporation may exist subject to levy and sale.

As a preliminary measure, the return of the sheriff will either produce a fund for the payment of the debt, or will presumptively prove that the corporation has no assets to answer the demand of the execution. An attempt has been made by an amendment to cure a defect in the bill, and so far as the first cause of demurrer is concerned, is successful; but how do we know that real estate, subject to levy and sale was not exhibited, and that by proper legal process the debt may not at this moment be in course of collection?

It is true the amendment declares that no exhibit of real or personal estate was made, but the sheriff does not so return the writ, and in the absence of this legal return to the *fieri facias*, while it may be true, as stated in the amendment, that payment has not (yet) been made, it may also be as true, that real estate exists, by a sale of which the debt may be paid. We are obliged to sustain this demurrer for the second reason assigned upon our record.

Demurrer sustained.

Charles E. Morris, Esq., for demurrer.

Charles E. Morgan, Esq., contra.

[Leg. Int., Vol. 30, p. 392.]

JOSHUA P. B. EDDY *et al.* vs. THE BOARD OF HEALTH.

The power of the board of health does not extend to the removal of tenants from their houses, and closing up the latter, unless justified by the existence of a pestilential disease.—Such action will be restrained by injunction.

Motion to continue special injunction. Opinion delivered *November 22, 1873*, by

PEIRCE, J.—The plaintiff, Eddy, is the owner, and the other plaintiffs are tenants of the properties, Nos. 629 and 631 Bainbridge street, in the city of Philadelphia. The board of health appointed a sanitary committee to inspect the district in which these properties are situate, who reported respecting these properties that the yards were to be cleansed, cellars cleaned, disinfected, and closed; also, shanty or frame building in the rear to be thoroughly cleansed, vacated and closed. The board of health thereupon gave notice to the tenants to remove therefrom or they would be forcibly ejected, and they ordered the houses and premises to be at once closed. The power of the board of health to abate nuisances and the causes of them, and to enforce sanitary regulations, is very great, and the courts never interfere with the legitimate use of their power; but to the contrary, excuse an excessive exercise of the power in cases where there is great peril to the public health, even when the city of Philadelphia is responsible for damages for the unlawful exercise of their power, as is shown in the recent case of *Sumner vs. The City of Philadelphia*, 30 Legal Intelligencer, 329. But the exercise of a power which is clearly unlawful, and which has no great public necessity to excuse it, will be restrained by the courts, no matter how praiseworthy the motives may be which prompted it. The board of health, in view of the possible approach of cholera to our city last summer, took active and praiseworthy measures to guard the city against pestilence, and so far as relates to the lawful measures adopted by them for the removal of nuisances, and all causes of disease, they have the hearty approval of all our citizens. When, however, they claim to remove citizens from their homes, and close up their houses, they must have either the sanction of law for it, or they must be justified by great public necessity, which demands such action, because there is no other way to avert the threatened peril—upon the same principle that buildings may be blown up to prevent the spread of a great conflagration.

This leads us to inquire into the law which would justify such action by the board of health. The powers conferred upon the board of health are statutory, and are to be found in the several acts of assembly conferring these powers upon them. The constitutions of the United States and the State of Pennsylvania both provide, that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and that no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation. The cases in which the board of health may enter private dwellings and remove persons therefrom, or close them up, are confined exclusively to cases of pestilence or contagious disease, by virtue of the 15th, 22d and

23d sections of the act of 29th of January, 1818. Their power to remove nuisances is also well defined, and before they can enter upon occupied or enclosed property to search for nuisances they must obtain a warrant prescribed by the 27th section of the act of 1818: *Kennedy vs. The Board of Health*, 2 Barr, 366; *Baugh vs. Sheriff*, 7 Phila. 82. And then if the owners or occupiers of the premises, on due notice, shall refuse or neglect to remove the nuisances, the board of health shall remove them and charge the expense to the owner of the property. In the cases of the bone-boiling establishments in certain wards of the city, the board of health appears to be empowered by the act of 29th of March, 1865, to enter the premises without warrant and abate the nuisance. In this case the power of the board of health was limited to the removal of the alleged nuisance, or cause of nuisance, and did not extend to the removal of the plaintiffs from their houses and the closing of them up, as there was no existence or allegation of existence of a pestilential disease there to warrant them in so doing.

The affidavits of the defendants also exhibit that they were doing what the law required them to do, viz., removing or had removed the alleged nuisances from the premises at the time they were required by the board to remove from and close up their houses. The most that the board of health could do in such a case would be to remove or cause to be removed the nuisances complained of. The law looks with too jealous an eye upon the right of every man to the peaceful possession of his house, his castle, the dwelling-place of himself and family, to permit him to be ejected from it, except in a clear case of right. No such right or authority in law has been shown in this case.

The special injunction is continued.

John A. Burton, Esq., for plaintiffs.

Robert N. Willson, Esq., for defendants.

[Leg. Int., Vol. 30, p. 416.]

HARDING vs. DEVITT *et al.*

1. The agreement of partners to make real estate part of the common stock must be in writing, and ought to appear of record.
2. Where the possession of the plaintiff, who was one of the tenants in common is disputed by the others, an issue should be framed and the facts found by the jury.

Opinion delivered December 6, 1873, by

PAXSON, J.—William W. Harding claims to be the owner in fee of an undivided one-fourth part of premises No. 427 Walnut street, and brings this bill for partition of the same against the defendants, Joseph E. Devitt, Nicholas P. Murphy, and Jeremiah L. Hutchinson, whom he alleges to be the owners respectively of the remaining three-fourths thereof.

The defendants allege that the said property belongs to the firm of Joseph E. Devitt & Co., composed of said defendants, and J. Morris Harding, a brother of the plaintiff; that said firm is insolvent, and that J. Morris Harding is indebted to it in a considerable amount.

The answer denies both the title and the possession of the plaintiff. The latter bought the undivided one-fourth part belonging to his brother Morris, and holds a deed therefor.

There is nothing upon the face of the title papers to indicate that the said property belongs to the firm of Joseph E. Devitt & Co. On the contrary, they show that each of said partners is entitled to an undivided fourth part as tenant in common, and that the share of J. M. Harding has been conveyed to the plaintiff.

In *Lefevre's Appeal*, 19 P. F. S. 122, it was held that as to purchasers, mortgagees and creditors, the agreement of partners to make real estate part of the common stock must be in writing, and ought to appear of record, and that it is not competent to show by parol that real estate conveyed to two as tenants in common is partnership property.

An attempt was made to show that the plaintiff was not a *bona fide* purchaser. The burden of proof is upon those who assert this proposition, and they have not established it. Having failed in this they cannot set up their secret equities to defeat the record title.

The defendants also deny the plaintiff's possession, and assert that they hold adversely. The law is well settled that an adverse holding by one tenant in common for any length of time, however short, previously to the institution of an action of partition, will bar a recovery in such form of action: *Law vs. Patterson*, 1 W. & S. 184; *Troubat & Haly*, vol. 2, p. 274. In an action of partition at law, where a defendant appears and pleads, and the interest or possession of the plaintiff is disputed, an issue would be formed and the facts found by a jury. By analogy, in equity, when plaintiff's possession is denied, it must be settled in the same manner as any other disputed fact. If the plaintiff has been ousted of possession the bill will not lie. But it is the fact of ouster, and not the assertion of it, that bars the plaintiff's recovery. The evidence in this cause does not sustain the answer upon this point. There is not a word of proof in support of it, and in the absence of proof mere averment will not avail.

The master makes no mention of this point, nor is there any exception pointing to it.

We think the master was right in his view of the law and the facts of this case. We therefore dismiss the exceptions and confirm his report.

James W. M. Newlin, Esq., for plaintiff.

George Bull, Esq., for defendants.

[Leg. Int., Vol. 30, p. 416.]

ASH vs. BOWEN.

Where a young woman makes a deed of trust and one year afterwards marries, held in this case to be in contemplation of marriage.

A limitation by which the course of descent is broken, makes the trust an active special trust, and should be kept alive to support the remainders.

Opinion delivered *December 6, 1873*, by

PAXSON, J.—When this case was before the court upon a former occasion, (*Legal Intelligencer*, vol. 30, p. 226,) we declined to make a decree upon a judgment *pro confesso* by default for want of an appearance, and directed that the judgment be opened and an answer put in by the defendants. This has been done. The answer admits all the

facts set forth in the bill, and the defendants submit themselves to the order and direction of the court.

Ellen Margaretta Harland, one of the plaintiffs, in the year 1856, executed a deed of all her estate, real and personal, to the defendants, in trust for her sole and separate use during her natural life, with a power of appointment by will, and in default of such appointment, then to hold said trust estate to and for the use of her children (or child, if only one), who shall be living at the time of her death, or to the issue of any who may be deceased; and to her husband, the latter taking a child's share; in default of any such child or children, then to such persons as would by the laws of Pennsylvania have been entitled thereto, if she, the said Ellen, had died unmarried, intestate, and without issue.

The deed contains the further clause, that the trust thereby created should not cease by reason of discoveriture, but should continue through the same, and during any second coverture.

The said Ellen Margaretta Harland intermarried with Thomas Reeves Ash, co-plaintiff, within one year after the execution of the said deed of trust, and had by him six children, of whom three are now living.

The bill avers and the answer admits, that at the time of the execution of the said deed of trust the said Ellen was unmarried, was not in contemplation of any particular marriage, and did not know Thomas Reeves Ash, with whom she afterwards intermarried.

It was said in *Wells vs. McCall*, 14 P. F. S. 215, that the creation of a trust constitutes the evidence of the fact of marriage being in the contemplation of the donor or devisor, and when this is followed within a reasonable time by consummation of the marriage, it concludes the proof. Where, as here, the settlement was made by the party herself, followed by her marriage within a year, the evidence has almost the force of an estoppel.

We are asked to strike down this trust upon the mere statement of Mrs. Ash, that she was not in contemplation of this particular marriage when the deed was executed. It is true, the trustees in their answer admit this with the other allegations of the bill. I do not, however, regard their admissions. They are not defending this case. They allowed judgment to go against them by default, and come in only because required to do so by the court. They wholly neglect to call for the proof of anything. And this, notwithstanding the fact that the said Ellen is now covert, the contingency contemplated by the trust, and the peril which she sought to protect her estate against.

If the case were doubtful, I would dismiss the bill *pro forma*, and thus compel the plaintiffs to obtain the decision of the Supreme Court. But I do not so regard it. Aside from the question above stated, Mrs. Ash has lost the control of her property by engrafting upon the trust a provision which limits her enjoyment of the property to a life-estate, with remainder over upon failure to appoint, to her children and husband. The effect of this is to break the course of descent, and the remainder-men take as purchasers by description, and not as heirs. The rule laid down is that, when an estate for life only is given, followed by a general power of appointment, and on failure to appoint, to children or

to special heirs, the power to appoint will not enlarge the estate of the *cestui que trust* to a fee, and on a failure to appoint, the children or special donees in remainder take by purchase from the donor, and not by way of limitation as heirs to the *cestui que trust*: *Dodson vs. Ball*, 10 P. F. S. 492.

This is not a mere separate use trust. It is a special, active trust, and must be kept alive to support the remainders.

Bill dismissed.

S. Davis Page, Esq., for plaintiff.

[Leg. Int., Vol. 30, p. 424.]

BOYLE vs. HAUGHEY.

Wife of defendant in an attachment against stock standing in her husband's name cannot be allowed to testify that the stock belongs to her.

Sur rule for new trial. Opinion delivered *December 13, 1873*, by

PAXSON, J.—Certain shares of stock in a building association, standing in the name of the defendant, were attached as his property. Subsequently the wife of the defendant was allowed by the court to come in and defend, upon her allegation that the stock referred to was her property, and paid for out of her separate earnings. Upon the trial of the case her counsel called her as a witness, and offered to prove the above facts by her. The court excluded her testimony, and this is now assigned as error.

The act of 15th of April, 1869, which provides that the parties to a civil proceeding may be examined as witnesses, contains the express provision that "said act shall not alter the law as now declared and practised in the courts of this Commonwealth, so as to allow husband and wife to testify against each other."

Musser vs. Gardner, 16 P. F. S. 242, and *Rowley vs. McHugh*, Id. 269, were cited in support of the competency of the wife as a witness. In the latter case an action of ejectment had been brought by husband and wife for land sold under a judgment against her husband. It was held that the husband had no interest in maintaining the title of his vendee, and that in such case the wife testifies not against her husband, but in her own behalf. In the case first named the husband sold the personal property of the wife; she brought replevin, to which suit he was not a party, and it was held she was competent to testify for herself under the act of assembly referred to. Thompson, C. J., in delivering the opinion of the court, says: "The husband was no party, and that he might possibly be called on at some time or other to answer on an implied warranty of title to property he had sold, and now claimed by the wife, was too remote and contingent to bring her within the prohibition of the statute from testifying against her husband."

The cases referred to differ materially from the one under consideration. In the latter the husband is a party and may appear and plead to the attachment, in which case an issue must be formed as to him. The shares in the building association, which are the subject of controversy, stand in his name, and are *prima facie* his property. The wife claims to be the owner thereof, and to withdraw them from the

grasp of the execution creditor of the husband. This is setting up an adverse title. She cannot do this by her own testimony as against her husband, or his execution creditor, who claims by and through him. It comes within the direct prohibition of the statute.

Rule discharged.

See also *In Re Knabb*, deceased, 30 Leg. Int., page 361, Woodward, P. J. Stover, for plaintiff.

Colahan and Davis, for defendant.

[Leg. Int., Vol. 30, p. 424.]

BARRY vs. McAVOY.

Plaintiff should allege in his bill, his right to a drain which he alleges defendant is about to obstruct.

Demurrer to bill. Opinion delivered *December 13, 1873*, by PAXSON, J.—The defendant demurs to the plaintiff's bill, and assigns as cause of demurrer that "the plaintiff does not aver that he has the right and privilege of the alleged drain or water-course, or that the same is reserved through the premises of the defendant."

This demurrer is well taken. The plaintiff wholly omits to aver that he has any right to the drain which he charges the defendant is about to obstruct. Nor does he state any fact from which such right can necessarily be inferred.

The demurrer is sustained.

Samuel Wakeling, Esq., for demurrer.

George F. Borie and C. F. Erichson, Esqs., for plaintiff.

[Leg. Int., Vol. 30, p. 424.]

GIVIN vs. GREEN.

The general rule is, that in order to establish the validity of a will the subscribing witnesses must be called, if living and within the jurisdiction of the court, but if, after strict, diligent and honest inquiry, satisfactory to the court under the circumstances of the case, the subscribing witnesses cannot be found, other evidence will be admitted to prove the signature of the testatrix.

Sur rule for new trial. Opinion delivered *December 13, 1873*, by

PAXSON, J.—This was a feigned issue to determine the validity of a paper writing purporting to be the last will and testament of Abigail Storer, deceased.

Upon the trial the case was narrowed down to a mere question of forgery. The jury found a verdict for the plaintiff, thus sustaining the will.

The third and fifth reasons assigned by the defendant in support of his rule may be considered together. They allege that the court erred in dispensing with the testimony of the subscribing witnesses, and in permitting the signature of the testatrix to the alleged will to be proved by other than the subscribing witnesses.

The general rule undoubtedly is, that in order to establish the validity of a will, the subscribing witnesses must be called, if living and within the jurisdiction of the court. In either of the latter contingencies proof must be made of the handwriting of the deceased or absent subscribing witness.

In this case the plaintiff was unable to find either of the subscribing witnesses, or to obtain any trace of them. Under such circumstances to exclude proof of the signature of the testatrix would be to shut out all proof of the execution of the will, and to prevent the parties interested therein from taking any benefit under it. This cannot be the law. It is in the daily experience of every professional man that important legal papers are constantly being witnessed by obscure persons who have no fixed residence, and whom it may be next to impossible to trace after a number of years have elapsed.

It would be equally vain to require proof of the handwriting of an absent subscribing witness, whom the parties have been unable to trace, or as to whom they could obtain no information whatever. In *Greenleaf on Evidence*, § 572, and in 1 *Starkie on Evidence*, 377, it is held that when a subscribing witness cannot be found after diligent inquiry, or is a fictitious person, the signature of the maker of the instrument may be proved by witnesses who have knowledge of his handwriting. See also *Cuntiffe vs. Sefton*, 2 East, 183, where the same principle is expressly decided.

The only remaining question upon this point is, whether due diligence had been used by the plaintiff in her search for the subscribing witnesses.

The rule is thus briefly stated in *Greenleaf*: "The degree of diligence for the subscribing witnesses is the same which is required in the search for a lost paper, the principle being the same in both cases. It must be a strict, diligent, and honest inquiry and search, satisfactory to the court under the circumstances of the case." (Sec. 574.)

The will of Mrs. Storer is dated in 1861. Inquiry was made upon several occasions in the vicinity where she resided at that time, for the subscribing witnesses, but no one there had ever heard of them. The Directory for several years about that time and later was examined, and every person whose name corresponded with that of either of the subscribing witnesses was called upon, and inquiry made as to whether he had witnessed such a will, without success. The latter mode of search was resorted to upon three different occasions and appeared to have been thorough. It is difficult to see what more the plaintiff could have done. The proof of diligence was satisfactory to the court at the time, and a re-examination of the law and the facts has not changed my view.

The fourth reason alleged is error in admitting in evidence the will of 1846. In support of the allegation of forgery the defence offered evidence of the declarations of the testatrix at various times prior to her death, that she had never made a will. To rebut this evidence the plaintiff proved counter-declarations of the testatrix that she had made a will. In addition the plaintiff produced a paper purporting to be a will of Mrs. Storer, dated in 1846, and which plaintiff swore was handed her by Mrs. Storer herself, with the statement that it was her (Mrs. Storer's) will. I do not see any error in the admission of this paper. It was strictly in rebuttal.

The sixth reason alleges that the court erred in charging the jury that the testimony of the expert called by the defendant "was not to be regarded by the jury, but that comparison of handwriting was the test, and that they were the exclusive judges thereof."

I did not charge precisely as is stated in this reason. I did say that it was for the jury to make the comparison of handwriting, and not for an expert; but I also said that as the expert had been allowed without objection to testify to his belief as to the signature from a comparison of it with the test papers, they should regard his testimony so far as it aided them in determining the question referred to; but that they should not allow it to control their own independent judgment. That this ruling was right under the authority of *Travis vs. Brown*, 7 Wright, 9, there can hardly be a question.

The remaining reasons are the usual formal ones. This case involves character as well as property. When that is the case the verdict of the jury upon the facts should not be disturbed without weighty reasons. Such reasons do not exist in this case.

Rule discharged.

Aaron Thompson and Thomas Lattner, Esqs., for rule.

William L. Hirst and W. E. Whitman, Esqs., contra.

[Leg. Int., Vol. 31, p. 4.]

JOHN W. SIMONS *et al.* vs. THE BUSTLETON AND SOMERTON TURNPIKE COMPANY.

In proceedings under the act of 1840 against a turnpike company must show :

1. That the complaint was made before the aldermen *of the neighborhood*.
2. They should be sworn to inquire whether the road, or any part of it, is in good travelling order and repair, not whether it is in *perfect* order.
3. The return of the constable should set forth the names of the citizens summoned.

Certiorari. Opinion delivered December 30, 1873, by

ALLISON, P. J.—The complaint in this case is authorized by the act of assembly of the 14th of April, 1840. It is founded on the sworn statement of three citizens of the Twenty-third ward of the city of Philadelphia, that the road of the defendants is in bad condition, out of repair at various points on the line of the turnpike, commencing at Point of Rocks, and extending to the Philadelphia county-line road.

The 14th section of the act of incorporation authorizes complaint to be made to any justice of the peace of the neighborhood within the county where the repairs ought to be made. Jurisdiction, therefore, to entertain a complaint, is not a jurisdiction common to aldermen or justices of the city, but is limited to those of them who are of the neighborhood of the portion of the turnpike which it is charged is out of repair. It does not appear from the record that the justice before whom proceedings were commenced was entitled to make inquisition. The affidavit begins by reciting that the affiants appeared before an alderman in and for the city of Philadelphia, without stating that being of the city of Philadelphia, he is of that portion of it which is in the neighborhood of the part of the road which is the subject matter of the complaint. There is affixed to the complaint the official seal of the justice, upon which it is represented that he is an alderman of the borough of Frankford, but whether the portion of the turnpike against which proceedings were begun is or is not in the neighborhood of Frankford is not asserted, nor in any way made to appear. In a proceeding of this character, nothing

is to be taken for granted. It is out of the course of common law; it is summary; it is against a public highway; but it is also against the private property of the defendants, of the benefits of which they are to be deprived, by an inquisition of a justice and three citizens, which takes from the defendants the usual guards and protection of a trial by jury, under the supervision of the court. Of this, it is true, the defendants cannot complain, they having accepted their grant of corporate franchise from the State upon this condition, but they have, nevertheless, the right to demand that the requirements of the law shall be rigidly followed, that those who propose to exact the condition nominated in the act of condemnation and forfeiture of the road, shall pursue with strictness the letter as well as fulfil the spirit of the law, and that this shall appear upon the record of the proceedings.

The propriety or the necessity of limiting jurisdiction to one or more of the aldermen of the city, and denying it to all others, is a question with which we have nothing to do; the Legislature have prescribed a rule to which those who propose to avail themselves of it must adhere, and it is a good and substantial objection to these proceedings, that the justice, before whom complaint was made, and who held the inquisition, does not set out that he is a justice of the neighborhood. That he is an alderman of the borough of Frankford, and of the county of Philadelphia, is not sufficient, for it still remains to be ascertained, by that which is not in the case, as it has been certified into this court, that he was entitled to take jurisdiction of the complaint.

The objection to the form of the oath administered to the viewers is well taken; they were sworn to inquire whether the road, or any part of it, was in such good and *perfect* order and repair as the said act of assembly required it to be, and such other matters and things as may be lawfully required of them in the premises. This covers much more than is provided for in the act. All that the viewers could lawfully be sworn to do, was to inquire whether the road, or any part of it, is in good travelling order and repair. There could be no legal condemnation of the road because it was not in perfect repair; the managers are required to maintain it in good order for travelling, and no more. The form of the oath was calculated to mislead the viewers as to the nature of the inquiry they were authorized to make, nor could they go into a general investigation of "other matters and things;" there is no such power given to them by the act, and in administering an oath which the law did not empower him to administer, and thus enlarging the scope of the inquiry, the justice exceeded his authority, and started with his viewers upon a hunt for that which could not properly be brought into the investigation. The act does not authorize a roving commission to search after "other matters and things," but limits the inquiry to one point only.

The return of the constable, endorsed on the back of the precept, is not a sufficient or legal return. The names of the three citizens summoned are not set out; we have nothing more than the averment that three disinterested persons had been summoned to be and appear at the time and place within named; who they were or where they resided does not appear. In analogy to all similar proceedings, this ought to be held to be an essential element of a proper return.

The return of a sheriff would be wholly insufficient, if it contained nothing more than that which is set out by the constable, and a challenge for this cause would be sustained. It is the right of every suitor before being called on to go to trial, to know who are to be brought in to act as jurors, or viewers, or arbitrators. Without this, the right of challenge is practically taken away, for it is too late to enter upon an inquiry as to prejudice, or favor, or interest, at the moment when the trial is to begin. It is true, that in making up the record, the fact is stated, that the constable appeared before the justice and jurors (as they are called), and returned that he had summoned three persons, whose names are given. But from this it appears that the return, in so far as it related to the viewers, was communicated orally at that time; the official return to the precept had been completed four days before, in which no names or description by residence or occupation is given. We have also the novelty of a return made to the parties summoned, if the recital in the record of the magistrate is to be considered upon the question of the sufficiency of the return. Proof was made, so says the record, before the justice and the jurors, who the persons were, who were required to act as viewers, and this was at the time fixed for the holding of the inquisition.

It is not necessary to examine the other exceptions for reasons assigned; the proceedings are quashed.

Jos. Abrams and John Lefferts, Esqs., for the exceptants.

George W. Dedrick, Esq., contra.

[Leg. Int., Vol. 31, p. 4.]

CITY vs. CATHCART.

Return of "served by serving a copy of original summons on defendant," is not sufficient.

Certiorari to Alderman Quirk. Opinion delivered *December 27, 1873*, by

PAXSON, J.—The defendant assigns for error that there was not a legal service of the writ of summons.

The return of the writ is as follows: "Served by serving a copy of original summons on defendant, October 16, 1873."

The words "served" and "serving" when used in this connection, are technical terms, and must be taken in their restricted, not their popular sense. To serve a writ is to deliver it with judicial effect; in such manner as to charge the person with the receipt of it. A return of "served" to a writ of summons amounts to nothing. It is a mere conclusion of law. The return must disclose the facts upon which such conclusion is based.

This return is obscure. The officer would seem to have *served* a copy of the original summons on the defendant. It was his duty to have served the original. This may be done in either of two ways: 1st, by producing the original summons to the defendant and informing him of the contents thereof; and 2d, by leaving a copy of it at his dwelling-house in the presence of one or more of his family or neighbors. Neither of these modes appears to have been adopted in this case. The

officer wholly omits to say what he means by the words "serving copy of original summons on the defendant." Was it served personally? The return does not say so, and in the absence of such statement, the law will not presume that it was. Had the constable left it at the dwelling-house of the defendant, in the presence of one or more of his family or neighbors, he could truthfully have returned "served on the defendant."

The exceptions are sustained, and the judgment of the alderman is reversed.

George Junkin and Robert H. Hinckley, Esqs., for defendant.

[*Leg. Int.*, Vol. 31, p. 4.]

BUTCHER vs. SOUTH AND WIFE.

Plaintiff after obtaining judgment against the husband is estopped from bringing another action for the same cause against the husband and his wife.

Opinion delivered *December 27, 1873*, by

PAXSON, J.—This was a demurrer by George South, one of the defendants, to the plaintiff's replication to said defendants' fourth plea.

The plaintiff brought suit against South and wife, under the act of assembly, for the purpose of charging the separate estate of the wife for necessities. The husband pleaded a former recovery against himself alone for the same cause of action. Replication by the plaintiff that "the said action on promises against George South, then made sole defendant, was discontinued," etc., to which replication this demurrer was filed.

We were requested to dispose of this case upon the merits, that is, upon the legal effect of the former recovery, without regard to the forms of the pleadings.

It is conceded that a judgment for the same cause of action was formerly recovered against George South, one of the defendants, and an execution issued thereon. Subsequently, the plaintiff desiring to proceed against the wife, entered what he calls a discontinuance of the first action.

We think the second suit cannot be maintained against the husband, for the reason that already one judgment has been recovered against him for this cause of action. We do not regard the discontinuance referred to as important in this respect. Had said discontinuance been before judgment, it would have been different. After judgment and execution the plaintiff may satisfy his judgment, but he may not "discontinue," in the ordinary meaning of the term, and commence another suit.

Nor is it easy to see how the plaintiff could recover as against the wife in the second suit, having recovered a judgment in the first suit upon a contract with the husband. The act of 11th of April, 1848 (*Purdon*, p. 1006), provides, that "judgment shall not be recovered against the wife, in such joint action, unless it shall have been proved that the debt sued for in such joint action was contracted by the wife," etc. The plaintiff is estopped by his former judgment against the husband alone, from now averring that the contract was with the wife.

The demurrer is sustained.

S. Davis Page, Esq., for plaintiff.

D. R. Patterson, Esq., for defendants.

[Leg. Int., Vol. 31, p. 4.]

LOWRY vs. LOWRY.

A residuary devisee of real estate cannot sustain a bill to compel the execution of a contract of decedent against his executors and the vendor. The estate must be settled in the Orphans' Court.

Opinion delivered *December 27, 1873*, by

PAXSON, J.—This cause was heard upon bill and answer. The plaintiff avers that Robert O. Lowry died on the 31st of October, 1873, leaving a last will and testament, by which after certain legacies, he gave, devised, and bequeathed all his estate, real and personal, to said plaintiff, Reigart B. Lowry, a brother of testator.

That prior to his death the said Robert O. Lowry entered into a contract in writing with Edward A. Warne, one of the defendants, for the purchase of six cottages, with the furniture therein, at Cape May, for the price of \$9,500 each.

The plaintiff, as residuary devisee, files this bill to compel performance of this agreement by the said Warne and the executors of Robert O. Lowry, and prays for the following relief:

1. That the said Edward A. Warne be directed to execute a good and sufficient deed for the said cottages at Cape May to the plaintiff, his heirs and assigns; and

2. That the said executors be directed to pay to the said Warne, upon the execution of the said deed, the amount due under the terms of the said contract.

It is unnecessary to refer to the answers of the respective defendants further than to say that the widow of said Robert O. Lowry declines to take under the will, and claims her full rights under the statute. If the prayer of this bill were granted, it would utterly defeat her right of dower in these houses, as the conveyance would be to Reigart B. Lowry, the residuary devisee.

It is to be noted that neither of the parties to this alleged agreement is asking for specific performance. It was suggested at the argument that this is really Mr. Warne's bill, though he appears as one of the defendants, and comes into court in this somewhat awkward position, from the fact that he would have no equity to ask specific performance as a plaintiff. This is certainly ingenious, but it will not avail, as the present plaintiff has no equity, and the court has no jurisdiction. The distribution of the estate of Robert O. Lowry belongs exclusively to the Orphans' Court. Were we to grant the prayer of this bill we should practically order the distribution of a considerable portion of the estate to the plaintiff as residuary devisee, within sixty days after the death of the testator. To state this proposition is to show its unsoundness. Whether the plaintiff is entitled to anything as residuary devisee, is a question that can only be legally determined when the estate is settled, and the debts and specific legacies fully paid.

The bill is dismissed.

[Leg. Int., Vol. 31, p. 13.]

IN THE CHARTER OF THE HOMESTEAD BUILDING COMPANY.

Under the act of February 18th, 1869, the courts will not approve an act of incorporation of a company to trade in real estate for the benefit of the stockholders alone.

Opinion delivered *January 6, 1874*, by

PAXSON, J.—The petitioners, twelve citizens of this Commonwealth, desire to be incorporated under the provisions of the act of 18th of February, 1869 (P. L. 201). Said act empowers the courts to grant perpetual charters to enable twelve or more citizens “to purchase, hold, and build upon, and sell in fee simple, houses and lots in the city of Philadelphia,” etc., etc., provided, that such company shall stipulate by their articles to devote their capital to improve parts of said city most needing physical, healthful, and moral reform, “which shall be defined and prescribed in their charter,” and not to exceed eight main squares; and shall apply all their profits, over their expenses, and a return of eight per centum per annum to the shareholders, to and for the construction of substantial stone, or brick, or iron habitations for homes for respectable persons of limited means, either as lessees or purchasers; and provided, that the said court shall be satisfied of the benevolent purposes of the petitioners.

It is manifest the Legislature did not intend by this act to authorize the incorporation of a company for the purpose of buying real estate and building houses thereon for the mere benefit of the shareholders. On the contrary, the object was evidently to enable persons by the aid of associated capital to buy up some of the plague spots of this city, demolish the buildings, and erect in their stead comfortable and substantial structures, to be sold at a moderate advance, or leased to deserving parties. Such a corporation was intended to be a *quasi* charitable institution, for it is expressly provided by the act that the court shall be “satisfied of the benevolent purpose of the petitioners.” The petitioners seem to have overlooked this clause in the act, and have furnished us no evidence of their benevolent intentions. There is not a glimmering of benevolence within the four corners of this charter. This alone would make it our duty to reject it, but there are other objections equally fatal. One is that there is no designation of the locality where the company proposes to purchase. It can take up its lots on Broad or Chestnut street as a mere speculation. The act of assembly requires the locality to be defined and prescribed in the charter. It may be that the precise location could not well be expressed prior to the purchase of the property; but the quarter of the city might at least be designated, and certain points fixed as boundaries.

The eighth article is also objectionable. It provides for a division of all the profits among the shareholders. The act of assembly restricts it to eight per centum. All the surplus, if any, beyond that sum must be appropriated under the act of assembly in aid of the benevolent objects of the company.

Section 2d of article 2 authorizes the company to issue coupon bonds to an unlimited extent, and sell the same for any price they may see proper. This is a very dangerous power to confer upon a corporation with a capital of only thirty thousand dollars. Many unthinking per-

sons are tempted by the high rate of interest or the low price of coupon bonds to invest in them without much inquiry as to the safety of the security. The act of assembly referred to contains a provision by which it is made lawful for any such corporation "to make loans on bonds and mortgages to others to build and improve, and the same to sell and assign, and to borrow moneys upon bonds and mortgages or otherwise for said purposes." The power to issue coupon bonds without limit and to sell the same on the market at fifty cents on the dollar or less, is too liberal a construction of the act of assembly referred to, and is not what the Legislature contemplated when it gave authority to "borrow money on bond and mortgage or otherwise."

It is our duty under this act of assembly to see that we do not charter a company for merely speculative purposes under the guise of a charitable institution. This is the more important because of the perpetuity of its charter as well as of its vast powers. Before we will approve such charter the petitioners must satisfy us of their "benevolent intentions," not by a mere statement thereof, but by such provisions and limitations in the charter itself as shall indicate its benevolent purposes, and which shall absolutely confine its operations to the purposes contemplated by the act of assembly.

A. L. Hennershotz, Esq., for the association.

[Leg. Int., Vol. 31, p. 36.]

FITZPATRICK vs. PENNSYLVANIA RAILROAD COMPANY.

There can be but one jury of damages under the act of 13th March, 1873, relating to Delaware avenue.

Opinion delivered *January 17, 1874*, by

PEIRCE, J.—This is a proceeding under the act of 12th March, 1873, which authorizes the Pennsylvania Railroad Company to take property near to Delaware avenue, for railroad purposes, and if they cannot agree with the owners thereof, to have viewers to assess the damages.

In this case, the property of the plaintiff was taken on which there was an outstanding lease, having some eighteen months or more to run. The viewers proceeded to assess the damages, and did assess them in favor of the plaintiff, in whom was the reversion, but no notice was given to the lessee of the premises, and his claim for damages was not before them.

The viewers having made their report to the court, the railroad company petition the court to refer the matter back to them to consider and assess the damages, if any, to the lessee. This is resisted by the plaintiff, who says, that the tenant can have his damages assessed by a separate jury of view.

The act seems to contemplate but a single proceeding in the case of one property, though there be different estates arising out of it; for it directs that "the viewers" shall estimate and determine whether any, and if any, what amount of damages have been sustained, and to whom payable, and that the estate thereby acquired by the said company shall be an estate in fee simple.

The petition is granted.

David W. Sellers, Esq., for plaintiff.

Chapman Biddle, Esq., for defendants.

[Leg. Int., Vol. 31, p. 36.]

JAMES LONG *et al.* vs. MAHLON DICKINSON *et al.*

The prayer of a bill for an injunction, against parties not named in the bill, and not in court, cannot be granted. The decree must be against the parties named in the bill.

In equity. Motion for a special injunction. Opinion delivered January 24, 1874, by

PEIRCE, J.—This court in *Keeley vs. Dickinson*, Legal Intelligencer, September 22, 1871, decided that, where an ordinance of the city of Philadelphia requires certain conditions precedent to an application for a contract, these must be complied with before a contract could be awarded, and that they could not be waived by the commissioner of highways.

In this case, which is a bill filed by property-owners, it is averred that Michael O'Rourke, who claims the contract for paving Kensington avenue, has not complied with the city ordinances, in that, he is not the paver selected by a majority of the owners, and has not advertised in the manner prescribed by them.

These averments so far as relates to the manner of advertising are not denied; the advertisements having been made in two daily papers not having the largest circulation, and less than two weeks prior to the time named for making his application.

We are asked to restrain the defendants from awarding the contract to Michael O'Rourke, or any person other than Jacob Peters and Samuel Sutton, who, it is alleged, have been selected by a majority of the owners of property fronting on said avenue, and intended to make application for said contract of paving as soon as can be lawfully done under the ordinance of December, 1862.

Neither O'Rourke, nor Peters and Sutton, have been made parties to the bill. The prayer of the bill is therefore too large, as we can make no decree in favor of Peters and Sutton, who are not in court, and do not ask the aid of the court, nor against O'Rourke, who is not a party to the bill, and therefore cannot have a decree against him.

All that we can do in this case, is to restrain the defendants from entering into a contract for the paving of Kensington avenue, from Lehigh avenue to Frankford creek, with any other person or persons than a competent paver or pavers, who shall be selected by a majority of the owners fronting thereon, and who shall have complied with the requirements of the ordinance of 31st December, 1862, as modified by the ordinance of 24th March, 1871.

The special injunction granted in this case, as hereby modified, is continued.

William Hopple, Jr., Esq., and Hon. F. Carroll Brewster, for plaintiff.
David W. Sellers, Esq., for defendant.

[Leg. Int., Vol. 31, p. 45.]

SCHLESSINGER vs. ELLIS et al.

1. The purchaser of a property sold at auction, cannot recover the deposit money when a good title is offered him.
2. The title of a married woman is good where it appears to have been bought and paid for out of her own means and credit.

Verdict for plaintiff. Rule for a new trial. Opinion delivered *January 31, 1874*, by

FINLETTER, J.—The defendants exposed at public sale certain real estate without indicating the owner. One of the terms of sale was, that the purchaser should deposit \$200 upon account of the purchase-money. The plaintiff became the purchaser, and made the deposit. He subsequently ascertained that the title was held by Mrs. Kennedy, who was living with her husband, against whom there were judgments amounting to \$30,000. For these reasons he rescinded the contract and demanded from the defendants the \$200. They refused to return the money, and this suit was brought to recover it.

The married woman's act has been a prolific source of judicial decision. We may gather from the act itself, and the decisions, some general principles to aid us in our present investigation.

1st. What is stated and decided in every case must be understood in reference to its special facts and circumstances.

2d. The property of a married woman acquired after marriage must be shown by her to have been paid for by her own means.

3d. The property of a married woman thus acquired, and its increase, may be held possessed and enjoyed by her free from any restraint by reason of the liabilities of her husband.

4th. There must be no fraud upon the rights of her husband's creditors; and no system inaugurated whereby they may be defrauded, hindered or delayed.

5th. That a married woman cannot purchase wholly upon credit. Her credit in like manner as her services belongs exclusively to her husband, and the fruits thereof are his.

If she could acquire property upon her own credit she might stand securely upon her deed until it was shown that her husband's means had entered into the purchase-money. This would work a hardship upon her creditors, never intended by the act, and not at all necessary to the enjoyment of her own property. It would, moreover, violate the cardinal rule, that she must show that she paid for it from her own resources.

6th. A married woman may acquire property by paying a small portion of the purchase-money and giving promissory notes and a mortgage for the remainder, although the husband may have joined in the bond and mortgage: 8 Wr. 194.

In the present case we have a married woman in possession of the property by devise, with one-third interest therein. By gift she acquires a further interest, and then by purchase the remaining interest. She thus acquires the whole property without the aid of her husband. Clearly at this point of time no creditor could pretend that the husband's means had been used in acquiring the property. Nor would the most

inexorable ask that his debt should be paid out of property thus acquired.

It is true she did not pay for this interest before the title vested in her; nor could she be compelled to pay upon her contract afterwards. The grantor could not enforce his rights in a court of law. In equity he might have redress. For this reason the property would not be her husband's, as was contended for by the plaintiff. In any event it would be either the grantor's, or the wife's. If he acquiesced it would be hers, and acquired without the aid of her husband.

If then it be the wife's property, she has the right to mortgage it, and use the proceeds in any way she may think proper: *Brown vs. Pendleton*, 10 P. F. S. 419.

Mrs. Kennedy, upon obtaining title, mortgaged the whole property for sufficient to pay the purchase-money of the interest she had purchased, and paid the grantor. This she had a right to do. So far no fraud was effected upon the creditors of her husband, for none of his means were used therein.

But in order to obtain the money upon the mortgage the husband executed a bond and warrant, and it is therefore argued that his credit obtained the money which was applied to the liquidation of the purchase-money, and therefore the property became his. Unfortunately for this argument the Supreme Court has said that the mortgage is the primary debt, and the bond is merely an incident of form, and gives the husband no equitable interest or title: 8 Wr. 194; *Brown vs. Pendleton*, 10 P. F. S. 419.

Again, before the money could be obtained, it was necessary that Mrs. Kennedy should be the owner of twenty-five shares in the association which loaned the money. These shares she paid for with funds derived from her father's estate. Before her purchase her husband had owned eleven of the twenty-five shares. If it had fully and clearly appeared that he had given her these shares, how could that affect her right to receive and dispose of the mortgage-money? How could it affect her antecedently acquired title? It was upon the credit of the property, and not upon the credit of the shares that the money was loaned. All that her husband's creditors could ask for would be the eleven shares, and they still remain to await their executions or attachments.

The evidence showed that the property was more than self-sustaining. The rents have paid all the expenses, the interest upon the mortgage and the monthly dues upon the shares. In all this, up to the present time, neither the husband's time, service, means or credit, have in any way been used in or about the property. There is nothing in the whole case to lead us to suppose it was ever intended that in any way the husband's creditors should be defrauded, or that they were defrauded; or could be defrauded.

The conclusion to which we have come is, that at the time the property was sold by the defendants, Mrs. Kennedy had a good title, and that her husband had no equitable, or other interest therein.

It is contended, that although Mrs. Kennedy may have a good title, it is not marketable, because it is always liable to the attacks of her husband's creditors.

If this position be correct, how can a married woman possess and enjoy

her property free from the restraints of her husband's debts? Surely the right to dispose of it is as important as her right to hold and possess it. The paramount idea of the act of 1848 was to lift from the married woman's estate the incubus of her husband's debts. We run directly counter to this beneficent policy when we permit the shadow of those debts to rest upon her title. We destroy one of its choicest fruits when we allow the fear of those debts to annihilate her right of alienation; a right inherent in the possession of all property.

If her title be good, the fact that some one may question it hereafter, does not make it doubtful. There is no title which may not be attacked. Titles derived from proceedings in our courts are likely to be assailed for alleged defects in those proceedings. Could contracts for the purchase of such properties be rescinded because the purchaser might be called upon to show that those proceedings were regular? Why then should he who agrees to purchase a married woman's property be allowed to disregard his contract because he may be compelled to show that she acquired it according to law? No policy of law or morals requires it; and the spirit of the act of 1848 forbids it.

The facts which make an otherwise good title doubtful, must strike at the title itself, and tend to establish a good title in another. In *Speakman vs. Forepaugh*, 8 Wr. 363, there was an outstanding title recorded after Speakman had purchased at sheriff's sale, but not within the time prescribed by the act of assembly. Even in that case the court held Speakman's title to be good in a court of law.

A husband's indebtedness is consistent with a perfect title to property in his wife. It does not advance an assailant a hair's breadth in his attack upon that title. It gives him a standing in court, and permits him to call upon her to show that she paid for the property with her own means, and nothing more. How could that make a good title questionable or doubtful?

If this view be incorrect, is the alleged blemish such as should be regarded in a court of law? There has always been a distinction upon this subject in courts of law and of equity. A court of law is satisfied with a title which is good. A court of equity will not compel a man to accept a title which he may be required to defend. This principle in courts of law has been extended to all actions for the purchase-money, upon the ground that they are really in the nature of bills for specific performance. The principle upon which this distinction rests it is not necessary to comment upon.

The plaintiff seeks to recover money which he paid upon his contract with the defendants that they should give him a good title to the property. This they have offered to do; and there is no basis for his claim. He is not defending against a bill for specific performance, or a suit for the recovery of the purchase-money. He is here the actor. He must show that the defendants are withholding the money claimed in violation of their contract with him. This he has failed to do, and should not recover.

The rule for a new trial is made absolute.

M. Sulzberger, Esq., for plaintiff.

S. Ridgway Kennedy and John A. Bickel, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 53.]

McNUTT vs. McEWEN.

Before a covenant not to practise medicine "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff.

In equity. Sur motion to continue special injunction. Opinion delivered *February 7, 1874*, by

PAXSON, J.—The defendant, who is a physician, sold his office and residence in this city to the plaintiff, and covenanted that he would not thereafter practise his profession in the "neighborhood."

It is conceded that the defendant has resumed the practice of his profession within three squares of his former location. The plaintiff seeks to enjoin him.

Upon the admitted facts of the case the plaintiff's right to an injunction would be clear but for the uncertainty implied in the word "neighborhood." It is a very indefinite term, and while I do not think the covenant void for uncertainty, and an action at law for its breach might perhaps, be sustained, it is difficult to define it by metes and bounds. Were we to enjoin the defendant from practising in his "neighborhood," it would be difficult to punish him for disobeying our order.

In its general or popular sense the word referred to means "a place near; the adjoining district; vicinity; a small district."—*Worcester's Dictionary*.

In its legal sense a man's neighborhood may be said to be co-extensive with the range of his frequent intercourse with his fellow-citizens: *Chess vs. Cless*, 1 Pa. 40.

In the sense in which it is used in this covenant it embraces the circuit of the defendant's practice as a physician. We cannot go beyond that, for the covenant is in restraint of trade, and must not be enlarged. Hence we could not extend it over the entire city. If we embrace Germantown and Chestnut Hill, why not Camden or Darby?

As the case stands now we might well refuse to continue this injunction; but it exhibits so palpable an instance of bad faith on the part of the defendant that we will permit the plaintiff to submit affidavits of the extent of the defendant's practice. If he can fix its boundaries with sufficient certainty we will continue the injunction; otherwise we must leave him to the chance of an injunction upon final hearing, or turn him over to his remedy at law.

J. R. Sypher, Esq., for plaintiff.

Geo. W. Harkins, Esq., for defendant.

[Leg. Int., Vol. 31, p. 53.]

HEYL vs. THE CITY.

A motion to dissolve an injunction can only be made after answer filed. This does not apply to *ex parte* injunctions.

Opinion delivered *February 7, 1874*, by

PAXSON, J.—In this case the usual *ex parte* injunction was granted, and after a hearing, continued, more than a year ago. On Tuesday last the cause was set down for argument upon a motion to dissolve. No

answer has been put in, nor has any step been taken by the defendant since September 28, 1872, when the order continuing the special injunction was made. I declined to hear the motion to dissolve, and continued the cause until the next equity motion day, for the reason that such application could not properly be made until after answer filed. Subsequent reflection has satisfied me that in this I was right. It is true, some of the text books say, that a motion to dissolve may be made before answer; but this manifestly applies to *ex parte* injunctions, and not to cases where there has been a hearing. Otherwise we might be constantly employed in reviewing our own decisions. It is purely a question of practice, and the correct rule in such cases will be found in Adams' Equity, 196, 359.

If the defendants put in an answer on or before the next equity motion day, they will be in a position to move to dissolve the special injunction.

D. C. Harrington, Esq., and Hon. F. Carroll Brewster, for plaintiffs.
R. N. Willson, and Chas. H. T. Collis, Esqs., City Solicitors, for the city.

[Leg. Int., Vol. 31, p. 53.]

DAVIS vs. SOUDER.

A license to take away soil, sand, etc., where the grantee has expended money on the faith of it, cannot be revoked.

Motion to continue special injunction. Opinion delivered *February 7, 1874*, by

PAXSON, J.—We do not attach much importance to the denial of plaintiff's title contained in the defendant's answer. It is not disputed that the plaintiff has the full equitable title to the seventeen lots in question, and that the legal title is now in course of preparation. This is sufficient to give him a standing in a court of equity.

The defendant justifies his taking of the "soil, earth, gravel, sand and stone," from the said lots, under a license from the Fairhill Land Company, at that time the owner of said lots, and now the vendor of plaintiff. Said license bears date the 31st of March, 1873; is signed by Louis Wagner, as chairman of the committee on streets of the Fairhill Land Company, and authorizes the plaintiff to "remove the surplus earth from the lots of the Fairhill Land Company, for the purpose of filling up Fifth street, and for no other purpose," etc.

The plaintiff contends that this is a mere license, without consideration; that it is revocable at the pleasure of the Fairhill Land Company, or by the plaintiff as the grantee of said company.

The general rule undoubtedly is, that a mere license may be revoked. There are exceptions, however, to this rule. One of those exceptions is, where the person to whom the license is given makes substantial improvements and expends money on the faith of such license, and with the knowledge of the person granting it. In such cases it has always been held that it would be inequitable to revoke it. "A license may become an agreement on a valuable consideration, as when the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable considera-

tion:" *Rerick vs. Kern*, 14 S. & R. 267. In this case the defendant, at the time contemplating entering into a contract with the city of Philadelphia, at a certain fixed price, to grade Fifth street, from Clearfield to Westmoreland street, proposed to the Fairhill Land Company to remove the surplus earth from certain of the lots of said company, and use the same in grading or filling up Fifth street, and the neighborhood of the said lots. He alleges that he would not have taken the contract at the price named therein, without the privilege of removing the earth aforesaid; that having obtained said license from the land company, he entered into said contract; has expended \$1,500 in the purchase and employment of horses, carts, etc.; and that if said license should be revoked it would subject him to a heavy loss.

Practically, the removal of the earth will add to the value of the lots, as it reduces them to the city grade. The plaintiff alleges, however, that a large proportion of the substance to be removed is gravel, and worth much more than the costs of removing it; that the land company acted improvidently, and not with a proper regard to the interests of its stockholders when it gave this license.

If this be so it is no concern of this defendant. He was authorized to do what was, in one view, at least, a benefit to the company. On the faith of it, and with the knowledge of the company that he intended to do so, he entered into a contract with the city for filling up Fifth street, and made a large expenditure in the purchase of horses, carts, etc. It would be against equity and good conscience to allow the land company now to revoke this license.

It was urged that the expenditure made by defendant had not been upon the lots in question. While this is true in point of fact, I do not see the force of the objection. In many of the cases cited by the learned counsel for the plaintiff there had been expenditures upon the land charged with the license, as in boring for oil, or sinking shafts for coal and other minerals. Yet none of the cases rest upon the ground that the expenditures had been made upon the land. The principle is, that having induced or permitted the party to expend his money upon the faith of the license, it would be inequitable to revoke the license, and thus deprive him of the fruits of his expenditure. No better illustration of this can be found than in the leading case of *Rerick vs. Kern*, before cited, where the plaintiff had erected a mill upon his own land upon the faith of a parol license to use the water from the defendant's property.

It was urged upon the argument that if the Fairhill Land Company cannot revoke this license, the plaintiff, as its vendee, may do so. This proposition assumes that the plaintiff is a *bona fide* purchaser without notice; whereas, the fact is undisputed in this case, that he is a stockholder in the said company, was one of the board of directors at the time this license was granted, and had actual personal knowledge thereof. He was part owner of these lots at the time of the grant, in the sense in which a stockholder of a corporation may be said to be interested in its real estate.

The equities of the case are all against the plaintiff, and his motion to continue the special injunction is denied.

R. P. White, Esq., for plaintiff.

John B. Thayer, Esq., for defendant.

[Leg. Int., Vol. 31, p. 68.]

CHRISTMAN vs. BAURICHTER.

After dissolution of a partnership and payment of its debts, if there is no special agreement, each partner should be paid ratably his advances.

In equity. Exceptions to master's report. Opinion delivered February 21, 1874, by

FINLETTER, J.—The capital invested was \$2,900; of which the plaintiff furnished \$2,000, and the defendant \$900. The business was unprofitable; and the assets are about \$1,400. The master distributed this sum in proportion to the capital advanced by each, and charged the costs equally.

The defendant excepts, 1st, because the assets should have been shared equally; and 2dly, because all the costs should have been imposed upon the plaintiff.

Articles of partnership are not intended to define all the rights and duties of partners *inter se*. Much is left to be understood and determined by general principles, which are always applicable when not clearly excluded. They are to be construed so as to defeat fraud, and the taking of unfair advantages: Lindley on Partnership, pp. 841 and 843.

In the case before us the articles of agreement provide that "the profits shall be divided equally." "And in case of the dissolution of this copartnership from whatever cause, the parties hereto agree to and with each other that they will make a true, just and final account, of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the copartnership are adjusted and its debts paid off and discharged, then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them."

It is clear there can be no division of assets until they shall have made "a true, just, and final account of all things relating to their said business, and in all things truly adjust the same." Not the least of the things relating to their said business are the accounts of the individual partners with the firm. They are some of the affairs of the copartnership, the adjustment of which they have made necessary to a division of the assets.

There is no allegation that "equally" was omitted from the clause by fraud or mistake. We cannot interpolate it; for that would be adding to the written contract of the parties. There is no ambiguity in the language used; and as it stands we must apply the principles of construction. "Divided" means divided according to law.

Partnership arises from a contract to join in lawful business; and to divide the profits and the losses. The controlling idea is a division of profits. The courts have always held that a partnership existed whenever the profits were divided, even though the parties may have agreed otherwise.

It nowhere appears that a division of assets enters into the definition of partnership. That, indeed, could only work a dissolution. This

should be kept in view when we consider the language of judges and text-writers in reference to the "shares" of partners. That term in an active partnership could mean only division of profits or losses. In the settlement of the affairs after dissolution its meaning could not be enlarged. It could not, therefore, include the capital. That must be distributed upon other principles, or by special agreement.

Capital is the conjoined means of each partner, to be used for a specific purpose. Its component parts should be none the less the property of the individual members when dissolution has occurred, because of the combination.

It may be considered well settled, that "when there is no evidence from which any satisfactory conclusion, as to what was agreed, can be drawn, the shares of the partners will be adjudged equal."

What follows from this? Equality in the thing created; in its objects; in authority, and in the profit and loss. It does not imply equality in the component parts of that by which the agreement of the parties was made effective. When the fabric is useless for the purposes of its creation natural equity would suggest that to each would belong whatever he had contributed thereto. Any other rule would be a continuing temptation to him who had furnished the smaller part, to violate his duty as a partner, and thereby compel a dissolution.

Accordingly, we find in Lindley on Part., p. 696: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is, that losses of capital, like other losses, must be shared equally; but it is not meant that on final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund, which ought to be divided between the parties in equal shares."

When a partnership is created there are two distinct parties interested therein, 1st, the individual members; 2dly, the conjoined members, or firm. The firm represents the capital. It is therefore debited with the amount paid in by each partner. But there must be also an account for each of the members, in which he is credited with what he brings into the business; and debited with what he takes out of it. These accounts show how they stand in relation to the firm, and to each other. Upon a final settlement they must be balanced just as any other. This would effectually preclude the possibility of an unjust distribution of the assets of the partnership.

In stating an account between partners each should be credited with what he has brought into the enterprise, and debited with what he has taken out. If there is no evidence as to the amount contributed by them, the shares of the whole assets should be considered equal.

Upon dissolution after the debts are paid, the advances should be first paid; and then each partner should be paid ratably what is due to him in respect of capital upon the settlement of the accounts of all the partners. If there should be a residue, it should be divided as profit in equal shares, unless otherwise agreed upon. The losses of capital, if not specifically provided for, must be borne equally: Watson on Part. 285; Lindley on Part., pp. 696 and 827; *West vs. Skip*, 1 Ves., Sr., 242.

The master has been governed in his distribution, substantially, by these principles. The costs of the proceedings have arisen from a

difference of opinion upon the articles in reference to a division of the assets. In this, no blame can be ascribed to either party; and therefore, the costs were properly charged in equal portions.

The exceptions are dismissed.

E. M. Hunt, Esq., for plaintiff.

P. T. Ransford, Esq., for defendant.

[Leg. Int., Vol. 31, p. 84.]

IN RE ARCH STREET, WEST PHILADELPHIA.

The authority given to the board of surveyors under the direction of the city councils, by the act of June 6, 1871, P. L. 1353, to confirm or reject plans or revisions of plans of surveys and regulations, invest them with power to alter or amend such plans in whole or in part, by blotting out or vacating one or more of the streets on such plans, and substituting others, or by adding new streets, and the action of the board upon any such plans unappealed from, is a finality.

In this case a petition was filed by certain freeholders and residents of the vicinity of Arch street, from Thirty-fourth street to Thirty-fifth street, in the Twenty-fourth ward of the city of Philadelphia, setting forth that said Arch street, between the points above mentioned, was formerly laid out on the plan of the city, but it was never actually opened. That by an ordinance of the city councils, approved October 23, 1871, the board of surveyors were authorized to strike said Arch street, from Thirty-fourth street to Thirty-fifth street, from the city plans, and therefore, the said board of surveyors projected and proposed a new and revised plan of that part of the city, vacating and striking out from the city plans said Arch street between the points above mentioned, and that due notice was given for thirty days by newspaper advertisements and posted handbills, according to law, prior to the action of said board of surveyors, when the matter was referred to a committee, reported favorably, and no one opposing it, said new plan was approved and adopted, thereby vacating and striking out said Arch street as aforesaid. The petition further set forth, that said Arch street as formerly located was not needed for the convenience of the public, and caused a number of irregular and angular lots to exist, which were a detriment to the general scheme of public improvements in that vicinity, and that all the owners of property in the neighborhood joined or acquiesced in the movement to vacate it. The petition further set forth, that some doubt had lately been expressed as to whether the said street had been lawfully and properly vacated.

The petitioners, therefore, prayed that they might be allowed to file this petition, and that the court would grant a rule to show cause why said Arch street, between Thirty-fourth street and Thirty-fifth street, should not be vacated and closed up according to law.

Michael Arnold, Esq., for the petitioners, stated that he presented the petition in consequence of the doubts which had been cast upon the authority of the city councils and board of surveyors, to vacate and close up streets without the confirmation of the court being required. He stated that the board of surveys claim the right to vacate streets as coming within the authority given them by the act of June 6, 1871, P.

L. 1353, and it is important that the right, if it existed, should be judicially recognized, or the practice of the surveyors stopped. In this case all the parties interested are entirely satisfied with what has been done; no one appealed, and all desire to have the proceedings confirmed under the act of May 18, 1854, enabling the courts to vacate streets in certain cases, if confirmation in that manner is necessary.

Robert N. Willson, Esq., Assistant City Solicitor, argued that the board of surveys has full power to vacate streets under the act of 1871, and this is particularly true of streets which have not been opened. He referred to the act of April 21, 1855, P. L. 264; and to *Paynter vs. Young*, 4 Phila. Rep. 153.

Opinion delivered *February 28, 1874*, by

ALLISON, P. J.—This application is refused for the reason, that Arch street, from Thirty-fourth to Thirty-fifth street, has been vacated or stricken out from the plans of the city, by the board of surveyors under the direction of the city councils, which action of the surveyors has not been appealed from, and is now a finality.* The act of April 21, 1855, P. L. 264, restricted the power of the councils and board of surveyors to alteration of lines and grades of streets, which had been laid out but not opened. The act of June 6, 1871, P. L. 1353, gives authority to the board to confirm or reject plans or revisions of plans of surveys and regulations. The distinction between the two acts is a wide one. In the first instance, nothing could be done except to alter lines and grades of streets *not opened*; in the last act there is full power to confirm or reject an entire plan or revision of a plan. The act of revising a plan implies an alteration or amendment in part or in whole of the plan itself, which consists of streets or roads plotted or laid down at fixed distances, and of established width, and with or without ascertained grades. A revision of a plan may well consist of such an alteration as shall carry with it a general rearrangement of the streets; or it may be done by blotting out or vacating one or more of its streets and substituting others, or by adding new streets. This constitutes the alteration, amendment or change which is implied in the power to revise the plan.

[Leg. Int., Vol. 31, p. 92.]

BURKHARDT vs. SCHMIDT.

1. An attorney cannot bind his client by an agreement for the sale of land.
2. What facts are necessary to constitute a purchaser at a sheriff's sale a trustee for another, who alleges that he refrained from bidding on account of an agreement with him, discussed.

Opinion delivered *March 14, 1874*, by

ALLISON, P. J.—The motion to dissolve the preliminary injunction in this case comes up on bill and answer.

The prayer of the bill is that defendant shall be restrained from proceeding against plaintiff or his tenant, and that he be directed to execute

* The right of appeal under this act was allowed in *Duhring's Appeal*, 30 Leg. Int., p. 153.

a lease for the described premises to plaintiff, according to the terms of an agreement set forth in the bill.

The plaintiff and defendant were each in their separate right, creditors of Lentz & Frank, who were the owners of premises 1217 and 1219 Frankford road, and of 1218 and 1220 Shackamaxon street in this city.

The property was sold under an execution issued by Schmidt, and bought, as the plaintiff asserts, by him, for the price of \$2,100. Title under this sale was not taken, and upon a second execution by defendant, it was again sold and bought by him for \$100.

The plaintiff charges, that an agreement was entered into at the time of the first sale, by which the defendant bound himself, that if the plaintiff would not bid at the sale, he, the defendant, would purchase the property and let plaintiff have it on payment of ground-rent, interest on mortgage, taxes, water-rent, interest on defendant's judgment, and \$500 on account of the judgment every six months until paid in full, when he was to convey the premises to plaintiff. Upon the strength of this agreement, he alleges that he paid to the sheriff, for ground-rent, interest on mortgage, and counsel fee to counsel of defendant, \$173.42.

The answer of defendant, in so far as it relates to the agreement first set up by plaintiff, contains a positive denial of this portion of the plaintiff's case. We find, also, a flat contradiction of the assertion, that he purchased the property at this sale. On the contrary, he asserts that it was bought by his attorney, in his own name, for himself, and that he and said attorney were opposing bidders for the property. This would seem to be conclusive against the plaintiff upon this portion of his case. The answer being positive in its denial, of whatever equity rests upon these allegations of the bill, and upon the denial contained in the answer, plaintiff has been content to rest his case.

But the bill alleges substantially the same equities in regard to the second sale, and charges that the premises were worth \$2,000, subject to incumbrances, which amount would have been bidden for them but for the agreement on the part of the plaintiff not to bid against defendant. It is asserted, that after the second sale, defendant employed other counsel, and that counsel then acting for defendant, renewed the agreement which Schmidt and his former attorney had previously entered into with plaintiff. A copy of this agreement is appended to the bill, and is signed by the counsel of plaintiff and defendant; it is dated June 6, 1873, and the acknowledgment of the sheriff was upon the following day, June 7, 1873. It is averred, that this agreement was entered into in consequence of a threat made by plaintiff to take a rule to set the sale aside on account of Schmidt's fraud, as it is called in the bill. The answer is positive in its assertion, that as to this second sale, the defendant did not make with plaintiff the agreement set up, or any other agreement in relation thereto, and that he never directly or indirectly authorized either his first or his second counsel, to make an agreement with the plaintiff in relation to the property, and that he never consented to or ratified said agreements, or either of them.

The defendant further asserts that he has made payments for interest, taxes, etc., to the amount of \$700, which plaintiff has not offered to repay to him, nor to comply with the stipulations of the agreement, a copy of which plaintiff has appended to and made a part of his bill.

Is the plaintiff upon his case, as he has stated it, and denied as it is in every material part by the answer, such an one, as can be enforced in equity?

In *Slingshuff vs. Eckel*, 12 Harris, 472, it was decided that an agreement by a bidder at sheriff's sale of real estate, to pay the debt of another if the latter would not bid, the former being permitted to purchase the property, was fraudulent as to the debtor or his creditors; was void and could not be enforced by suit. The court say the point had never before been directly ruled by the Supreme Court, but that the principle had often been declared that all judicial sales must be open to fair and free competition.

In several cases it has been held that a promise to purchase at sheriff sale for the benefit of another, will not constitute the purchaser a trustee, unless the purchase was made with the money of the party seeking relief. Payment of the purchase-money at the time title is acquired, or fraud in obtaining title, is requisite to raise a resulting trust: *Barnet vs. Dougherty*, 8 Casey, 371; *Jackman vs. Ringland*, 4 W. & S. 149; *Kellum vs. Smith*, 9 Casey, 158. There is no pretence that the purchase-money upon the second sale was paid by the plaintiff; was there then such fraud in the purchase, fraud perpetrated by the grantee, as to constitute him a trustee *ex maleficio*?

We have seen that all fraud is expressly denied by the answer, and upon this denial plaintiff rests his cause; defendant meeting every allegation of wrong, so far as he is personally concerned, by a clear and direct contradiction of the averments of bill.

The only ground upon which plaintiff can hope to rest his application, must be the agreement of the attorney of the defendant, made the day before the acknowledgment of the sheriff's deed, and which the plaintiff says was induced by the threat to have the sale set aside. But if title was thus acquired, and the agreement afterwards repudiated, whose is the fraud? Certainly not that of the defendant, who never made it, and who never ratified it after it was made. Without authority delegated to an attorney at law, or consent subsequently given, it cannot, we think, be successfully maintained, that one acting in that capacity can make for his client a binding agreement for the sale of real estate; this is one of the stipulations of the articles of the 6th of June, 1873.

The authority of an attorney-at-law in Pennsylvania is more extensive than in most countries, say the Supreme Court in *Lynch vs. The Commonwealth*, 16 S. & R. 368, on the ground that here he acts in some degree as the agent as well as the lawyer of the client; this enlargement of power is founded on custom; it extends beyond the obtaining of judgment in an ordinary suit, and enables the attorney to control an execution, so that he may not only give time to a defendant, but he may give binding directions to the sheriff. In *Wilson vs. Young*, 9 Barr, 101, it was held an attorney-at-law may refer his client's cause to arbitrators, with an agreement that the award shall be final. Judge Rogers remarks, it would be difficult to point out anything in the conduct of a suit to judgment which he may not do. The limitations imposed on him relate generally to compromises which substitute one thing for another, as real estate for money, or to transactions after judgment. An attorney may not bind his client by an agreement by which land is taken instead of

money: 14 S. & R. 307; 1 P. R. 267; 9 Barr, 315; 3 W. & S. 426. Much less can he bind his client by an agreement for the sale of land; it requires a special delegation of authority in writing to enable him to do this.

As to the other stipulations of the articles, by which it was agreed, that defendant should first execute a lease of the property to plaintiff, and pay counsel fees, they are put out of the case by the answer of defendant, and so far as the promises of the plaintiff bind him, it is sufficient to say, that he has neither performed them, nor tendered performance; he cannot have equity till he do equity. Every ground on which this case rests is unsubstantial, and the injunction must be dissolved.

William H. Staake, Esq., for plaintiff.

Hunsicker & Bullitt, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 92.]

NAGLEE vs. THE CITY OF PHILADELPHIA et al.

The act of May 6, 1872, only gives the right to open streets through Monument Cemetery. It does not give the right to go beyond.

Motion for injunction. Opinion delivered *March 14, 1874*, by

ALLISON, P. J.—The plaintiff claims that by the will of her late husband, Henry Naglee, she became possessed for life of two contiguous tracts of land, lying between the southern boundary of Lehigh avenue and Falls road, over a portion of which Fifteenth street has been laid down on the plans of the city of Philadelphia.

She avers that Patrick McEntee, one of the defendants, acting under the authority of the chief commissioner of highways of the city, is about to open Fifteenth street through said land, that he intends to enter upon and grade said street through her land, without a notice having been served upon her of the intention of the city to open said street; without payment of damages or security having been given for the same, or the appointment of a jury to ascertain the extent of the injury she will sustain, if the purpose of the defendant is carried into effect.

The defendants justify their proposed action, by citing the act of the 6th day of May, 1872, P. L. 1163.

This act declares that Fifteenth, Sixteenth, and Norris streets, are laid out through Monument Cemetery, of the same width as they are laid out on existing public plans up to the boundary lines of said cemetery. The act further declares, that it shall be the duty of the chief commissioner of highways to cause the said streets to be opened and paved.

The property described in the bill filed is not within the boundaries of Monument Cemetery; it was admitted on the argument to be at least a mile distant therefrom. To state this fact is to decide that this injunction must be continued. By no latitude of construction can the language of the act, upon which defendants rest their justification, be extended to streets not within the boundaries of the cemetery.

The sole purpose of the act is to lay out the streets named therein, through the burying-ground, and to direct that within sixty days they shall be opened and paved. This is the whole of it, and renders unne-

cessary the consideration of the question, whether the city can take the land of a citizen for public use, without first paying or securing the payment of the damages which will thereby be sustained by the owner. *Wister vs. The City*, 21 P. F. Smith, 46, reaffirms the doctrine of *Sower vs. The City*, and *Large vs. The Same*, 11 Casey, 231, that the corporate authorities cannot open a street for public use and highways, without paying or giving security for the payment of damages that may be occasioned to the owners of the land over which it is laid out.

Whether a distinction exists between the case of an actual appropriation of the land by an act of the Legislature, and a taking for public use by the city under the general road law, it is not necessary to consider. Our decision in this case rests upon the want of authority, under the act which was supposed to give power to enter upon, open, grade and pave the portion of Fifteenth street, laid down upon the land of the plaintiff.

It would seem that the question becomes unimportant, in cases which may hereafter arise, by reason of the restriction placed upon the legislative power of the Commonwealth, by the 7th section of the third article of the new constitution.

George W. Thorn, Esq., for plaintiff.

Robert N. Willson, Esq., for defendants.

[Leg. Int., Vol. 31, p. 108.]

TUCKER vs. HORNER *et al.*

Proceeds of realty—sold under a power—and found within this jurisdiction, will be ordered into the hands of the administrator *d. b. n. c. t. a.* of him whose realty was sold, rather than to the administrator *c. t. a.* of his widow, who had hitherto held as executrix, and enjoyed as life-tenant such proceeds, even though she was a creditor of her said husband's estate by an amount nearly equalling the fund in controversy: *Provided*, those in remainder desire distribution through such first administration.

In equity. Your orator complains and says:

I. That Inman Horner, domiciled in the State of Virginia, died in the year 1860, having previously made his will, which was duly proved and letters testamentary granted thereon by the proper tribunal, in Virginia, in 1860.

II. That by the fifteenth clause of said bill (a copy of which said clause is hereto annexed, marked A, and made part hereof), said testator devised one-half of his tract of land, near Warrenton, Va., called Bellair, to his wife Anna Maria, for life, and after her death to the children of his deceased daughter, Margaret H. Evans, and the descendants of any of her children who should then be dead, to be divided among them equally, except that the descendants of such deceased children shall take their portion *per stirpes*, and empowered his executors to sell the same, and the moneys received therefrom were to be invested in State or United States stock or bonds, and the dividends or income should be paid to his wife for life, and after her death the said stocks and bonds should be transferred and paid to the children of his daughter, Margaret H. Evans, and to the descendants of any of them who should have died. And by the 23d clause of said will he devised the residue of his estate to his wife for life, remainder to the children of

his deceased daughter, Margaret H. Evans, and the descendants of any of them who might be dead; and he appointed his wife executrix, and three other persons executors of his said will.

III. That in the lifetime of testator's widow, the said tract of Bellair was, under the power aforesaid, sold, and said widow being then in the city of Philadelphia, three thousand dollars of the proceeds of said sale was, after having been received from the purchaser by the executors of said will in Virginia, remitted by them to her. She placed said sum in the hands of her brother, Dr. E. Peace, who invested it in the United States registered loan of 1865 six per cent., 5-20s.

IV. That said Dr. Peace caused the certificates of said loan to be made out in the name of defendant as trustee, and five certificates therefor were issued in the name of Alfred Horner, trustee, as follows:

Certificate	No.		Date of Issue.	Amount.
	B. No.	877.	July 23, 1867.	\$1,000
"	N. "	5,578.	Jan. 21, 1868.	500
"	B. "	4,688.	" 27, 1869.	500
"	B. "	5,433.	" 12, 1871.	500
"	N. "	7,936.	" 31, 1871.	500

which said certificates said Dr. Peace received and forthwith handed the same to defendant, in whose possession they have since remained, and who has collected the interest thereon as the same became payable.

V. That Anna Maria Horner, widow of said Inman Horner, died in June, 1873, having received from the defendant all of the interest on said \$3,000 United States bonds, up to January 1, 1873, inclusive.

VI. That the children of Margaret H. Evans, remaindermen of said estate, as aforesaid, and the assignees of two of them who have parted with their interest, are citizens of Pennsylvania, and residents in the city of Philadelphia.

VII. That letters of administration *cum testamento annexo* on the estate of Inman Horner, deceased, which is in Pennsylvania, were duly granted by the register of wills of Philadelphia county to your orator.

VIII. That said Alfred Horner is a resident of Philadelphia, and is in possession of the five aforesaid certificates or bonds of the United States, and of the coupons or interest thereon, from and including July 1st, 1873, and although requested by your orator to deliver up and transfer the same to him refuses so to do; therefore, your orator prays relief as follows:

I. That defendant be enjoined from parting with or transferring said bonds or certificates to any other persons than complainant.

II. That defendant be ordered and directed to transfer to your orator said five United States bonds or certificates with their accrued interest.

To the order of the court in the premises Alfred Horner submits himself as a stakeholder. Several of the remaining defendants who have been brought in by amendment, admit the truth of all the matters set out in the bill, and join in the prayer of the complainant.

Thomas Vernon makes separate answer, and says among other things, that the last will and testament of Anna Maria Horner, deceased, having been duly proved and letters testamentary thereon having been duly granted to this defendant in the city of Newport, State of Rhode Island, the place of said testatrix's domicile at the time of her death,

letters of administration *cum testamento annexo* on the estate of the said testatrix, which is in the State of Pennsylvania, were then also duly granted to this defendant by the register of wills in and for the city and county of Philadelphia.

That this defendant is informed by counsel, and believes that the devise passing under the fifteenth clause of the will of Inman Horner, deceased (as cited in paragraph II. of said bill of complaint, and exhibit "A" thereto annexed), passed as real estate, and was to be held and enjoyed as such and not as personal property, and that as no debts due by the estate of the said Inman Horner are alleged as the ground of said bill of complaint, the complainant, as his administrator *c. t. a.* has no title to these securities, or their product, in the hands of the defendant, Alfred Horner; that Alfred Horner was the mere *agent* of defendant's testatrix, and in no respect a *trustee* under the will of Inman Horner; and that the estate of Inman Horner was indebted to that of his widow, and that by his last will such indebtedness had been specially ordered to be paid, but by an account filed so lately as the 4th of September last, an indebtedness of nearly \$3,000 still appeared to be due.

That this defendant has requested the said Alfred Horner to deliver up and transfer the said five certificates of United States registered loan, and the accrued interest thereon, if any, to him, as the legal representative duly constituted of her, from whom the said Alfred Horner first received the same at the hands of Dr. Edward Peace; but the said Alfred Horner has refused and still refuses so to do.

And he prays:

1. That the said defendant, Alfred Horner, may be ordered and directed to transfer, assign, and deliver up to him the said five certificates of United States registered loan with the interest thereon accrued, as alleged in the bill, and admitted in said defendant's answer to have been received and to be still held by the said Alfred Horner.

Opinion delivered *March 28, 1874*, by

ALLISON, P. J.—The only question which we are called upon to consider upon the pleadings, is, has the plaintiff made out such a case, as will warrant the court in granting the prayer of the bill?

The defendant, Thomas Vernon, has we think no standing as a contestant for the fund in controversy. He claims solely as administrator *cum testamento annexo*, of Anna Maria Horner, who, under the will of her husband, took but a life-estate in the property devised to her. One-half of a tract of land called Bellair, situate in Virginia, he devised to his wife Anna Maria, during her natural life, and at her death to the children of his daughter, Margaret H. Evans. The will contained a power of sale under which the executors sold the land and transmitted the funds now sought to be recovered to the widow of Inman Horner, who was at that time residing in Philadelphia, and from her it passed to her brother, Dr. E. Peace, in the manner set forth in the bill, and was by him invested in the name of the defendant, Alfred Horner, as trustee. It is stated in the bill and not denied in the answer, that the income received from these investments was paid to the widow up to January, 1873, and that she died in June following. What interest then has the

representative of her estate, in that which consists not of income which accrued during her life, but of the corpus of the estate, which by the express terms of the will of Inman Horner, is devised to the children of Margaret H. Evans, after the death of the widow of the testator? We cannot see that the administrator of Anna Maria Horner has any standing in court, either to claim the fund in right of the said Anna, or to object to its payment to those who are clearly entitled to it now that she is dead. All of the defendants brought in by the amended bill appear, and confess the allegations therein contained, and join in the prayer of the plaintiff, or having been warned, stand mute before the court. This brings the case within the principle of *Adlum's Estate*, 6 Phila. Rep. 347, decided by this court, afterwards affirmed by the Supreme Court.* We there held, that where parties entitled to distribution of a fund in the hands of a local administrator, asked for distribution here, we would not send the fund to a foreign administrator, even though he was the administrator of the domicile, and compel parties claimant, whether creditors or distributees, to go there to make their claim. This case was afterwards followed by *Parker's Estate*, decided in several distinct applications in this court, each of which was affirmed in the court above; and is at this time before the Supreme Court upon appeal; the case having been brought before us in the last instance, by legislation, intended to reverse the decisions of this and the Supreme Court.

The distinction between the present case and *Adlum's Estate* is, that the fund is not actually in the hands of the administrator *c. t. a.* of Inman Horner, but is held by the nominal trustee, who confesses that he retains the fund only as stakeholder, and until the court shall decide to whom he shall pay it over; which brings us back to the question, is the plaintiff under the law of Pennsylvania, entitled to the control of the securities now in the hands of Alfred Horner?

An administrator *d. b. n.* is one appointed to administer the goods of an estate, which has been partially administered by a former executor or administrator. This is but a continuance of the original administration by another hand, under a separate responsibility, but by the same authority. The effect of which is to subrogate the substituted administrator, to the common law and statutory rights of creditors, next of kin and legatees, for the benefit of all interested in the fund. *Drenkle vs. Sharman*, 9 W. 488; *Carter vs. Trueman*, 7 Barr. 315; *Richardson vs. Richardson*, 9 Barr. 431. Upon the death of an executor, or where from any cause he is unable to execute his trust, under the will, or is dismissed because unwilling or unable to comply with an order of the court, an administrator *d. b. n. c. t. a.* is appointed, who has the same powers and authorities as were conferred on the executor, the difference being, that if the will contains specific powers by which land is to be converted into money, security will be required. The power under the will of testator, so far as it relates to the sale of the land, had been executed, but the will looks to a retention of the invested proceeds by the executors, and the payment of income only, to the life-tenant, and to a distribution after her death to the grandchildren of Inman Horner;

* See *Dent's Appeal*, 10 H. 514.

this the executors, if they still survive, have deprived themselves of the power of doing, having placed the principal of the fund in the hands of the life-tenant; at the same time, they transferred it to this jurisdiction, which is a jurisdiction foreign to that in which the executors can, as such, exercise their powers; a jurisdiction which is not that of the domicile of the testator. There seems, therefore, to be no other way in which this fund can be disposed of, so as to enable the parties entitled to distribution to make legal claim to the same, except to order it to be paid to the present plaintiff, to whom letters *c. t. a.* have been granted, and who of necessity has entered security for the proper application of the money or securities demanded by him. The defendant, Alfred Horner, is merely holding the investment nominally, though not in fact, as trustee. Dr. Peace, who made the investments, had no power to create a strictly legal trust; he could of right exercise no dominion over the money which would enable him to stamp it with a character, or attach to it incidents which were not authorized by the will of Inman Horner; yet, as the defendant, Alfred Horner, has accepted the care of the securities as nominal trustee, the law will regard him as if he stood in that relation to the property; he is certainly a *quasi* trustee, and as such, equity will control his disposition of the fund, so as to protect it for the parties to whom it of right belongs. This was done in the first instance, by enjoining against a transfer of the bonds or certificates; and now, that which remains, is to grant the second prayer of the bill, and order that he transfer the aforesaid bonds to the plaintiff.

This order is, we think, fully warranted by the spirit, if it is not within the letter of the 31st section of the act of February 24, 1834, which enacts, that administrators *de bonis non*, with or without a will annexed, shall have power to demand or recover from their predecessors, or their legal representatives, all moneys, goods, and assets remaining in their hands, due and belonging to the estate of the decedent. This fund clearly belongs to the estate of Inman Horner, and ought of right to be in the hands of the predecessors of the plaintiff in the administration. It is held now, by one who can well be regarded as holding for them, as their agent or representative, and who, therefore, ought to deliver the same to the administrator *d. b. n. c. t. a.* who is substituted for the executors, and who has the same powers and authorities as were conferred on them: Scott on Intestate Law of Penna. 522.

As the parties entitled to the fund are either acquiescing in this application, or have joined in asking that the prayer of the bill be granted, we think that all legal obstruction is removed, if any existed, and we therefore make the order prayed for.

The defendant, Alfred Horner, is allowed to retain out of the fund in hand, a reasonable compensation as counsel fee, with the further reservation of his right to make claim for commissions upon the funds in the hands of the administrator *d. b. n. c. t. a.* in compensation for his trouble in the care and management of the securities intrusted to him.

John Samuel, Esq., for complainant.

Inman Horner, Esq., for defendant, Alfred Horner.

S. Davis Page, Esq., for defendant, Thomas Vernon.

I. Newton Brown, Esq., for defendants, Joseph R. Evans, Sr., and Inman H. Evans.

[Leg. Int., Vol. 31, p. 109.]

NEWKUMET vs. KRAFT et al.

A parol agreement to purchase real estate is of no effect. A part payment without possession, and which was afterwards appropriated to another indebtedness, will not take it out of the statute of frauds.

Opinion delivered March 28, 1874, by

ALLISON, P. J.—The plaintiff in his bill charges, that he purchased in May, 1868, from his brother John, a house and lot on north side of Vine street, sixty-seven feet east from Twenty-second street, in this city, for the price of \$1,700. That he paid him by check \$1,000 on account of the purchase-money. This payment is not disputed, nor is the fact, that an oral agreement, such as set forth in the bill, was entered into. But it is set up by way of answer, that in August, 1868, John Newkumet, now deceased, applied the \$1,000 in part payment of an indebtedness of plaintiff to him of \$2,600, and that in January, 1869, he entered the same on his books, to the credit of plaintiff's general account.

The evidence shows a tender to the executors of the balance of the purchase-money, accompanied by a demand for a conveyance of the property to plaintiff.

The admission by John Newkumet of the agreement to sell the property in question to plaintiff is clearly established by the proofs; it was made to his conveyancer in May or June, 1868, upon whom he called and requested him to prepare a deed for the property, conveying it to the plaintiff, stating that he had agreed to sell it to his brother Rudolph. The proof also is, that he subsequently called for and got the deed, and that not long before his death he said to the same witness, that he intended to execute the deed, that plaintiff was to have the house by paying the balance of the purchase-money.

The defendants rest their defence mainly on the general principle, that the contract which is here sought to be enforced is but a parol contract for the sale of land, unaccompanied by delivery of possession, and that plaintiff has acquired no title that can be enforced, either at law or in equity. In this case there is nothing more than the payment of a part of the purchase-money, which followed the parol agreement for the sale of the real estate, and the preparation of a deed by the owner, which was never executed.

The general doctrine asserted by the defendants has been so often maintained by the highest authority in Pennsylvania, that it cannot be successfully questioned at this day. Nor is it at all shaken by the admitted qualification, that equity will enforce a parol contract for the sale of land, if it has been so far executed that it would work a fraud to rescind it. This has been interpreted to mean, where that which has been done under it is incapable of being compensated at law: but in *Hill vs. Meyers*, 7 Wright, 172, Judge Strong remarks, payment of purchase-money may be compensated; it may be recovered back with interest. Accordingly, it has often been held, that payment of purchase-money alone will not take a parol purchase out of the statute. This, he says, was more than intimated in *Withers' Appeal*, 14 S. & R. 185; it was directly decided in *McKee vs. Phillips*, 9 Watts, 85, in

Parker vs. Wells, 6 Wharton, 153, and in *Gangwer vs. Fry*, 5 Harris, 491. To the same effect are the cases of *Reed vs. Reed*, 2 Jones 117; *Moore vs. Small*, 7 Harris, p. 461; *Greenlee vs. Greenlee*, 10 Harris, 225; *Richards vs. Elwell*, 12 Wright, 361. Our books of reports are studded with cases which support the principle, that every parol contract for the sale of land is within the statute of frauds and perjuries, except there has been such part performance as cannot be compensated in damages. And that to take a case out of the statute, it is necessary to prove along with the parol contract for the sale of lands, delivery of possession in accordance with such contract, part payment of the purchase-money, and generally, where the nature of the case will admit of it, that valuable improvements have been made on the land: *Milliken vs. Dravo*, 17 P. F. Smith, 230; 9 Casey, 411; 8 Harris, 110.

But the plaintiff contends, that he has presented a case, which, under the authority of several Pennsylvania decisions, cited by him, takes it out of the statute, and that he is entitled to a decree for specific performance. In *Milliken vs. Dravo*, 17 P. F. Smith, 230, the late chief justice remarks, we have, in very many instances, held sales by parol partly executed, good, and refers to 12 Wright, 361, 3 P. F. S. 332, and 6 Wright, 171, and remarks, that if others be required, there is a bead-roll of them cited in these cases.

None of them, however, will, on examination, be found to affect the general principle, so firmly set in the law of our State. In *Richards vs. Elwell*, 12 Wright, 361, the court held no more, than that it was error not to have left to the jury under the evidence, the questions of sale and identity of land; extent of the purchase; payment of the price and *delivery of possession*, in pursuance of the contract, as constituting together, a sufficient title in the purchaser in possession. In *McGibbeny vs. Burmaster*, 3 P. F. S. 332, the decision is, that it is inequitable to rescind a parol contract of sale, in which the terms, the subject, its boundaries and quantity; valuable improvements with the assent of the vendor, and *possession taken* in pursuance of the contract. In *Lauer vs. Lee*, 6 Wright, 171, the action was brought against a defendant *in possession*, who alleged a parol contract and part payment of the purchase-money. There is one feature of this case very like that now before us, "a payment on account of the house and lot," was afterwards carried by plaintiff to the general credit of defendant in a separate account; it was held to be error to reject an offer to prove this fact, the court saying, that if the withdrawal and change of payment did not prove a rescission, it was evidence against the claim of the defendant, for payment of the purchase-money.

The cases relied on by plaintiff do not sustain his claim to specific performance: *Coll vs. Selden*, 5 Watts, 528, the agreement was in writing; part purchase-money paid and delivery of possession. *McFarson's Appeal*, 1 Jones, 503, there was a written agreement which described the land with certainty; there was a valuable consideration to support the contract; possession under a contract in writing was held not to be necessary.

In *Lowery vs. Mehaffy*, 10 Watts, 387, the agreement was in writing, part of the purchase-money had been paid and possession given.

Wilson vs. Clark, 1 W. & S. 554, was the case of the parol agreement, no money paid, nor possession taken.

Ferguson vs. Staver, 9 Casey, 411, was ruled mainly on the want of certainty, in the written agreement, as to what land had been sold.

The plaintiff has not made out his case, the contract was by parol, possession was not delivered, and under the testimony it is a question whether the decedent did not rescind the verbal agreement by directing the bookkeeper to place the \$1,000 paid by plaintiff, to his credit upon the general account which existed between the brothers, and which, notwithstanding the credit given, left the plaintiff debtor to his brother in a considerable sum. The weight of the evidence favors the theory of an express rescission of the agreement.

Nor can the plaintiff rest his claim to have the contract perfected upon any other basis than the promise of the decedent. The \$1,000 went to pay that which he owed, and now that he has been discharged from the balance of his indebtedness by the will of the brother, he cannot complain of any actual wrong done to him. It may have been that the appropriation of the \$1,000 to the general account existing between the brothers, induced the release by which the plaintiff has been largely benefited.

Bill dismissed, the costs to be paid by plaintiff.

John C. Redheffer, Esq., for plaintiff.

John Q. Adams, Esq., for defendant.

[*Leg. Int.*, Vol. 31, p. 116.]

LONG et al. vs. O'ROURKE et al.

If property-holders nominate A to the commissioners to do the paving, the fact that they nominate another person afterwards, does not revoke their nomination of A.
ALLISON, P. J., dissents.

In equity. Motion to dissolve injunction. Opinion delivered April 4, 1874, by

FINLETTER, J.—Whatever this controversy may be in its results, it is now simply a wrangle between rival contractors for the profits of paving certain streets. The property-owners, who may be compelled to pay for the work, are also parties.

For three years the defendant O'Rourke has been active to have these particular streets paved. In his efforts he has expended time and money. He succeeded in obtaining a large majority of the owners of property to enter into a contract in writing with him to do the paving. Upon presentation of this contract to councils, they passed the usual resolutions directing the commissioner of highways to award the contract.

He then made publication, whereupon Peters and Sutton obtained an injunction and stayed his further action. They, however, improved the opportunity, and procured the signatures of nearly all the owners of property to a contract with themselves to do the paving.

On the 19th of February they appeared before the commissioners, and claimed to have the contract awarded to them. O'Rourke also appeared and made a like demand.

The commissioners were called upon to decide between the parties, each of whom presented like claims. Both were competent pavers; and both had been nominated by a majority of the property-owners.

The Supreme Court has said, that the contract, as it is called, of the property-owners, is merely a nomination, and may be revoked. We do not think the nomination of a second, in this manner, is a revocation of a former nomination. It is, perhaps, better that the owners should make more than one, for then the commissioners could select the best.

There was no formal revocation by the property-owners of their nomination of O'Rourke, nor did they appear in person to oppose his application for the contract. They, however, duly authorized by letter of attorney, J. W. Hipple, Jr., Esq., as follows: "to appear for us and in our names use his best endeavors to prevent said contract from being given to Michael O'Rourke. And we hereby further authorize and empower him to institute such proceedings, and take such steps and measures, as may be necessary, in his judgment, to prevent such contract from being given to said Michael O'Rourke."

The attorney appeared and presented his letter of attorney, and objected to the contract being given to O'Rourke. This, it is contended, is a revocation of O'Rourke's nomination.

The question for the commissioners to decide was not which of the contestants the property-owners desired to have the contract, but which of them should be selected. Now, it will be observed, that O'Rourke's nomination was not formally revoked. It was therefore before the commissioners for them to act upon just as any other. What right had they to suppose that the property-owners desired to withdraw it when they neglected or refused to say so?

It may be conceded that no set form of words, or acts, may be required to revoke such a nomination, but it must also be conceded that the words or acts should be directed to that nomination, and not to the consequence only which may flow from it.

When a person is named for appointment to an office or duty, no amount of objection to his success will wipe out the fact of that nomination, and especially should this be so when those who object have the power to withdraw him altogether from the competition.

If, however, we are in error in this, have the property-owners placed themselves in a position to demand from us equitable relief?

They have encouraged the defendant to devote his service and money to this enterprise. They gave no notice to him when they selected another, and permitted him still to act and spend upwards of \$250 in the belief that he was their nominee. When the officers of the city were required to award the contract they permitted the nomination to stand, and left its revocation, at best, to inference and conjecture, when a word from them would have settled the matter beyond dispute. This surely is not the fair dealing which equity always demands.

Besides, the plaintiffs have not been injured and cannot be injured, if their position be correct. Unless the contract has been legally awarded to O'Rourke they will not be required to pay him for his work. They will therefore be benefited instead of being injured by the action of the commissioners.

The injunction is dissolved.

The President Judge considers that the property-owners by their acts virtually revoked O'Rourke's nomination. But inasmuch as it appears

by the affidavits of the defendants, and is not denied by the plaintiffs, that Peters and Sutton took advantage of the injunction of this court unfairly to obtain the signatures of the property-owners, it would be inequitable to allow them to profit by their unfair dealing with the defendant and with the court. He therefore concurs in the conclusion to which we have come.

William Hopple, Jr., Esq., and Hon. F. Carroll Brewster, for plaintiff.
David W. Sellers, Esq., contra.

[Leg. Int., Vol. 31, p. 124.]

THOMPSON vs. THOMPSON.

It is only after a sentence nullifying or dissolving a marriage, or a conviction of bigamy, that the parties are at liberty to marry again as if they had never been married: *Harrison vs. Harrison*, 1 Phila. 389, and *Howard vs. Lewis*, 6 Id. 55, cited and followed.

In divorce. Opinion delivered April 11, 1874, by

ALLISON, P. J.—The preamble to the first section of the act of March 13, 1815, recites, that it is proper to grant relief to an *innocent and injured party*, who has entered into the marriage state, where one of the parties is under a natural or legal incapacity of faithfully discharging the matrimonial vow, or is guilty of acts inconsistent with the sacred contract.

The first section of the act makes the following causes sufficient grounds for a divorce; where one of the parties is impotent; a former and still subsisting marriage; adultery; wilful and malicious desertion; cruel and barbarous treatment of the wife by the husband. "In every such case, it shall and may be lawful for the *innocent and injured person* to obtain a divorce from the bond of matrimony."

From this two things are clear, that to the innocent and injured party alone can relief be granted, and that a subsisting marriage at the time the second marriage was entered into, is a distinct ground for a divorce from the bond of matrimony. Not, as often contended, that as between the contracting parties, it may be treated as absolutely null and void, but that *inter parties*, it is a cause for which the Courts of Common Pleas may decree a divorce.

This interpretation of the law is strengthened by that which follows in the second section of the act, which declares that all marriages within the degree of consanguinity or affinity are void to all intents and purposes. But it does not provide that the parties to such a contract, though it is declared to be void, may treat it as of no effect as to themselves, but on the contrary, it gives the courts authority, *in such cases*, to grant divorces from the *bonds of matrimony*. It even places a restriction upon the exercise of this power by requiring that if such a marriage is not dissolved during the lifetime of the parties it shall not be inquired into after the death of either of them. From this it will be seen, that though a marriage within the forbidden degrees of relationship is declared to be void, yet the parties to it are to seek emancipation from the bonds of matrimony through a decree of divorce, or a sentence of nullity of marriage, or a conviction for bigamy: *Harrison vs. Harrison*, 1 Phila. Rep. 389; and this null contract will not be allowed to be im-

peached after the death of one or both of the parties to it. Legitimacy of children, the rights of property, and all other incidents of a legal marriage are placed beyond question, after the death of either husband or wife.

By the eighth section of the act of 1815, such a decree may be entered, as to law and justice may appertain; the court may dismiss the petition or libel, decree a divorce, or that the marriage is null and void, but it is a question whether a sentence or decree of nullity of marriage under this act, can be made for other causes than those specified in the second section; this is not, however, material as to the case now under consideration, as the application may be safely rested upon the act of April 14, 1849, P. L. 647, which recites, that where a supposed or an alleged marriage shall have been contracted, which is absolutely void, by reason of one of the parties thereto having a husband or wife living at the time, the Courts of Common Pleas shall have power to decree the said supposed or alleged marriage to be null and void, upon the application of an innocent or injured party. This act speaks of the marriage in no doubtful terms; it is declared to be void, and is called an alleged or supposed marriage, because of the want of ability in one of the parties to make a valid matrimonial contract. The act, notwithstanding all this, requires a judicial investigation of the alleged incapacity, and a judicial decree of nullity, if the averments of the libel are established by proof. It is doubtless upon this act of 1849 that the application of the petitioner is founded.

The material allegations of the libel are, that libellant was joined in marriage with the respondent July 10, 1868; that said marriage was and is absolutely void by reason of respondent having then a husband living. It is further charged that she was, on the 10th of May, 1866, lawfully joined in marriage with William Ryan, who is still the lawful husband of respondent. That at the date of his, petitioner's marriage, he was innocent and ignorant of said marriage of respondent with Ryan.

The petitioner further averring, in the language of the act, that he was, at the time of his marriage with respondent, *an innocent and injured party*, he prays the court to decree his said marriage to be absolutely null and void.

This application for relief must be distinguished from that which is authorized by the act of March 13, 1815, which gives to the courts power to *grant a divorce* to an innocent and injured party, from the bonds of matrimony, where one "hath knowingly entered into a second marriage in violation of the previous vow he or she made to a former wife or husband, whose marriage is still subsisting."

The effect of a decree in favor of a petitioner on the ground of a pre-existing marriage granting a sentence of nullity of contract, is substantially the same as a decree of divorce, though the form of it may be somewhat different; we say may be different, because, by the 8th section of the act of 1815, a decree of separation from the nuptial ties is authorized for certain causes, or that the marriage is null and void, the latter decree being precisely the same as that set forth in the act of 1849.

The necessity for the latter act is not apparent, unless the decree of nullity of marriage is restricted under the act of 1815, to cases within

the degrees of prohibition. The act of 1849 holds the petitioner to a compliance with the forms prescribed by law, for cases of divorce from the bonds of matrimony. There is therefore no economy of time or saving of money; it is not a short cut out of the tangle, and it seems to give no more than an election, as to which mode of procedure a petitioner will adopt.

In the United States we have no ecclesiastical courts; therefore, before jurisdiction can be exercised in matters relating to marriage and divorce, courts must have power conferred on them by statute. In several of the States of the Union, it has been held, that in cases of void marriages, where fraud is alleged, equity will collaterally take jurisdiction of the question, but in Pennsylvania no such claim has ever been set up, nor indeed was it possible that it could have been, statutory authority having been conferred on the Courts of Common Pleas to grant divorces long before equity jurisdiction was given to them. We therefore are to look to our statute law, as the only source of our power; that which is there given us to do we may perform, and no more; the results which follow a proper exercise of authority are those only which the law declares, and the manner even in which the power may be carried into effect is prescribed.

In *Harrison vs. Harrison*, 1 Phila. Rep. 389, we held, looking to our statute law alone as our guide, that it was only after a sentence nullifying or dissolving a marriage, or a conviction of bigamy, that the parties were "at liberty to marry again in like manner as if they had never been married." *Griffith vs. Smith*, 2 Penna. Law Journal 151, was cited to the same effect, and *Howard vs. Lewis*, 6 Phila. Rep. 55, is in maintenance of the same principle. We have referred to this view of the law and the cases in which it has been supported, because the argument for the respondent rested upon the contrary doctrine, which we have seen no reason to adopt. Not denying that certain marriage agreements are invalid—absolutely void, but holding, that under our law the parties to such a contract, though it turns out to be but a contract in form, must establish the nullity of the marriage before they can marry again.

This brings us back to the questions of fact upon which this case turns, and requires us to ascertain from the testimony, whether the libellant is entitled to the decree in his favor, of the nullity of the marriage, which was celebrated between himself and the respondent, ratified as it was by subsequent cohabitation.

The courts of this Commonwealth do not permit every party to a void marriage to maintain a suit for nullity of marriage; he must show *prima facie* at least, that he is an innocent and injured party. In England, either party to a void marriage may ask for a decree of the nullity of the marriage, even though he or she entered into the contract with a knowledge of an existing disability, and it is only where such marriage has been induced by positive fraud, that the party practising it will be denied relief.

The libellant confesses the necessity of establishing that he is an innocent and injured party to entitle him to the decree of nullity of marriage. Do the facts as they appear by the proofs show that he has established this element of his case?

The libellant confesses in his testimony, that he knew, before and at

the time of his marriage with respondent, that she had been twice married, first to one John Donohue, and afterwards to William Ryan. He says respondent informed him, that she was engaged in obtaining a divorce from Donohue, and that she was prosecuting her suit while libellant and respondent were living together, before their marriage. He knows a divorce was obtained, but whether it was in 1868, or before or after his marriage with her, he cannot say.

Libellant testifies, "she told me she was married to a man in Baltimore by the name of William Ryan; this was before my marriage." The testimony discloses the fullest knowledge on the part of the libellant, of both the prior marriages, and that when he married the respondent, he did not even know, nor does he seem to have cared to inform himself, that she had been divorced from Donohue. The testimony shows that such a divorce had been obtained on the 18th of January, 1868, but this was some nineteen months after she had been joined in marriage to Ryan, and that when she married him she was and had been for a number of years the wife of Donohue.

The libellant attempts to excuse his marriage with the respondent, by alleging that he was under the effects of liquor at the time; that he had no intelligent knowledge of what was going on, and that he was in somewhat of a stupor; but this statement is in direct conflict with that of the clergyman who performed the ceremony. He says, that when he entered the room, in which libellant was, he was introduced to him; that he apologized for not rising, owing to a sprained foot, took hold of the prayer book, which was held by both the libellant and respondent, and that he read the responses therefrom; the ceremony being according to the rites of the Episcopal church.

The fact further appears by the testimony of this witness, that a short time thereafter, in company with respondent, libellant called on the clergyman at his residence for a certificate of the marriage; he adds, the libellant's manner was calm and gentlemanly at the time I performed the marriage ceremony, and was so when he called upon me with his wife, for the certificate. His manner was kind and affectionate to the respondent. Nor is it to be forgotten, that libellant continued to live with respondent for some time after the marriage, and after he had obtained from the clergyman the evidence of it. He assigns as his only reason for separating from respondent, that he could no longer live with her, because of her habits of intoxication, violent temper, and general bad conduct.

The testimony does not sustain the allegations of the libel, that petitioner was innocent and ignorant of the marriage of respondent with Ryan, and that he is an innocent and injured party.

But the testimony fails in another essential point. It is not shown that William Ryan, who in 1868 was in prison during all of that year in Philadelphia, is the person who by that name, in 1866, was married to the respondent. That which he stated to the officers of the prison in the absence of the respondent, cannot be allowed to prejudice her rights.

The witnesses examined in Baltimore to prove respondent's marriage with William Ryan, do not pretend to identify even the photograph of Ryan, so as to connect it with the man, who by that name was shown to have been living in Philadelphia in 1868.

There is, therefore, no proof that William Ryan, to whom respondent was married in 1866, was living at the time of her marriage with libellant.

For these reasons the rule to show cause why a decree establishing the nullity of the marriage of libellant with the respondent is discharged.

Decree refused.

There is also a pending rule taken by the respondent, asking that libellant be ordered to pay additional counsel fees.

A rule for alimony and counsel fees was heard more than a year ago. It was resisted upon the ground that respondent was living with a man other than her husband. That they kept house together, and that she thus had means of support, which rendered an order such as she prayed the court to make unnecessary. The depositions taken in resistance of the application, established the allegations of the libellant, and the order was refused. There has been nothing shown since that hearing, to change the case as it then stood before the court. The defence of the respondent rests upon technical grounds alone. Her standing before the court is wholly void of merit, and her conduct in every respect, is such as to take from her all claim to a favorable consideration.

We are not prepared to make the order prayed for, and therefore discharge the rule.

Daniel Dougherty and E. H. Hanson, Esqs., for libellant.

R. E. Brown and G. L. Crawford, Esqs., for respondent.

[Leg. Int., Vol. 31, p. 140.]

HURLBURT vs. FIRTH.

1. Easements or servitudes which are apparent and continuous, and which are technically extinguished or put to sleep by unity of title, and are allowed to remain undisturbed, revive upon severance.
2. The act of May 20, 1857, applies to a division wall, as well as to a PARTY WALL.

In equity. Exceptions to master's report. Opinion delivered April 25, 1874, by

ALLISON, P. J.—Charles C. West was the owner of two adjoining properties, situate on the north side of Arch street, in the city of Philadelphia, Nos. 135 and 137.

On the 16th of June, 1830, he conveyed No. 137, the westernmost lot, with a three-story brick house thereon erected, to Thomas Dugdale, Jr., from whom the title has passed to the plaintiff.

On the 11th of January, 1831, West conveyed No. 135, being the easternmost of the two properties, to Dugdale, and from him title is deduced to the defendant, John Firth.

The equity of complainant as set forth in his bill, consists in alleged violations of covenants which run with the land of plaintiff, and which are contained in the deed of property No. 137 from West to Dugdale, the deed of June 16, 1830, by which West charged his lot adjoining on the east for the benefit of lot No. 137, with the use and privilege of a two feet wide alley along the west side of No. 135, for a passage-way and water-course, extending thirty-eight feet north from Mulberry street, and thence by a northwestwardly line commencing at that distance on the east

side of said alley, continuing to a point in the centre of the alley forty-one feet north from Arch or Mulberry street. The width of the passageway was at that time only twenty inches, but it was stipulated that whenever No. 135 should be rebuilt upon, the walls of the houses should be "exactly two feet wide in the clear." There was also provision for laying water-pipe in said alley, for the enjoyment of both properties, and a reservation by West of a right to build against and into the easternmost wall of No. 137.

The violations of the plaintiff's right as charged against the defendant are, an encroachment upon the alley, by building a nine-inch wall along the west side; shifting the alley to the eastward of its original location; tearing up and permanently obstructing the water-course over the alley-way, and building a party wall upon the northern portion of the alley.

The finding of the master is against the defendant upon all the points in controversy; he reports the form of a decree, which directs the defendant to restore the alley-way and pipes of conduct to the condition in which he found them in March, 1869, to remove so much of the party wall as extends south from a point forty-one feet north from the north line of Arch street, and to remove the nine-inch wall erected in the alley against the eastern wall of plaintiff's house.

We cannot give our assent to the proposition of the master, that by unity of title in Dugdale, which was effected in 1831, by the conveyance of the easternmost lot to him, the easements and restrictions created by the deed of 1830 were absolutely extinguished. That by merger they were lost when the servient tenement was conveyed to the owner of the dominant tenement. We do not mean by this, that when both tenements became vested in the same owner, the easement of the alley-way did not, technically speaking, become extinguished by unity of title, or lost by confusion. This may be conceded, but it is a loss which exists in name only, and not in reality, the right remains under the higher title of ownership; and upon a severance of the estate by a conveyance of a part of it, the grantee becomes entitled to all the apparent easements which had been used by the owner during the unity of the estate, and without which the enjoyment of the several portions could not be fully had. This is the point decided in *Kieffer vs. Imhoff*, 2 Casey, 442. The late Chief Justice Lewis, in a learned opinion, discusses the doctrine of merger of easements by unity of title, and conceding that the owner may undoubtedly alter or qualify the several parts of his heritage, and that if the alterations are palpable and manifest, or if the change be named in a conveyance of part of the property, the alienee of a portion of the joint premises will take subject to such alteration of the original condition of the land. The right of the owner is absolute over his estate, subject only to such restrictions upon the exercise of this right as the law of the land imposes, and if he elects to exercise this right, who can object? But if easements or servitudes, which are apparent and continuous, and which are technically extinguished or put to sleep by unity of title, which are allowed to remain undisturbed, they revive upon severance. *Kieffer vs. Imhoff* was the question of an easement of an alley-way, and in that respect is like the present case, if we are right in holding that the covenants contained in the deed of West to Dugdale, of 1830, for the westernmost property, are valid and bind-

ing covenants, which, though held in abeyance during the time of the ownership of both properties by Dugdale, revived upon severance, in so far as they related to the open and manifest easements or incumbrances upon the land to which they applied. It was mainly upon the strength of the principle maintained in *Kieffer vs. Imhoff*, that *Worne vs. Marsh*, 6 Phila. Rep. 33, was decided by this court. Both of these cases differ from the present one, in the fact that the properties to which they applied had been sold by the sheriff, which sales, it was held, did not affect the general principle that rules in regard to the continuance of easements after a severance of title.

We have said this much upon this question to guard against an assent to the principle stated by the master. His decision is based on the covenants contained in a conveyance of Dugdale to Martha Bacon, and in the deeds of the subsequent owners of No. 137, which covenants, he finds, are substantially the same as those which are set forth in the first deed of West to Dugdale, and which, he says, are broad enough to sustain the case of the plaintiff. In this he may be entirely correct, if they can be regarded in any proper sense as constituting a part of the plaintiff's case; they are not set up in the bill, but only the covenants and agreements contained in the deed of 16th of June, 1830; these we regard as valid and binding covenants, under which the rights of the plaintiff may be enforced. As the master has found the covenants contained in the several subsequent deeds to be substantially the same, there is no need to examine the question whether Dugdale, in his conveyance to Martha Bacon, exercised his right of ownership, and changed the character or the conditions, as to the easements, from what they were when he purchased from West.

The first and second exceptions to the report of the master relate to his finding that the building inspectors could have ordered the wall of complainant to have been taken down, to be replaced by a legal party wall, and that defendant could not shift the alley-way to the eastward, so far as it was necessary in using the plaintiff's wall, without having it condemned.

The plaintiff's east wall is built entirely on his own ground; it is not, therefore, a party wall, which is a wall laid in part on the ground of each of adjoining owners of land. This law is a municipal regulation founded on the purest principle of equity, and has regard to the best interest of adjoining owners, saving to each of them in the occupation of land and the expenditure of money.

The act of May 20, 1857, P. L. 590, provides, that where a new building is about to be erected, the building inspectors shall examine the party or division walls upon or adjoining grounds, which had been erected prior thereto, and if adjudged by them to be insufficient and unfit for the building about to be erected, such party or division wall shall be taken down, etc., according to the provisions of the act of May 1, 1865.

There are two questions which arise under the facts as they relate to this portion of plaintiff's case.

First. Is the easternmost wall of plaintiff within the provisions of the law relating to party walls? It was contended for the defendant that it is not, and that the act relates only to walls which had been laid

between party and party. In this conclusion we are not able to agree with the defendant; the language of the law refers to party or division walls upon or adjoining the lot about to be rebuilt upon; it is in the disjunctive, and includes a division wall which separates one building from another; this separation might be by a wall laid in part on adjoining properties, or which was built wholly on the land of one of the adjoiners. In either case it looks to a readjustment and reconstruction of a dividing wall, that it may be properly adapted to the new structure; and for wise reasons, includes both party walls and division walls which are not party walls. In our judgment, the eastern wall of plaintiff's house is within the letter as well as the spirit of the law.

The second consideration which arises in this connection, presents the question whether, under the covenants of the deed to Dugdale for lot No. 137, a party wall could be laid on the land of the plaintiff, so as to shift the alley to the eastward of its original location. The defendant can only take to himself such building privileges as he has obtained by purchase from those under whom he holds title to his land. If his lot was subject to easements and incumbered with restrictions in favor of the dominant tenement when Dugdale sold to defendant's grantors, he must abide by the burthens with which his property is loaded, unless he procures a release from those who have a right to claim an enforcement of prior covenants in their favor. The deed of 1830 contemplated building into the eastern wall of plaintiff's house, and this might carry with it the right, if the necessities of the case required it, to have the wall condemned, and a party wall substituted. But more than this cannot, we think, be claimed by defendant; conceding this much, he is thrown back upon this right, of which he has not availed himself, but has, against warning and with his eyes open, violated the clear and positive rights of the plaintiff.

We are prepared to make the decree suggested by the master, and will do so, if the parties do not, within thirty days, come to an amicable settlement of the several matters in dispute between them.

George Junkin, Esq., for plaintiff.

D. W. Sellers and Geo. W. Dedrick, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 140.]

WOOD *et al.* vs. ELLIS.

Where the defendant dealt directly with the executor, the ruling of the Supreme Court in Maitland's and Hand's Appeal does not apply.

Opinion delivered April 25, 1874, by

PAXSON, J.—I regret that the Supreme Court, in dissolving the injunctions in Maitland's and Hand's Appeals, did not announce the principles upon which it decided those cases. It would have been a lamp to our feet in disposing of the remainder of these cases. In the absence of any satisfactory information as to the views of that court upon the points involved, excepting what is necessarily implied from its judgment, we can only regard the cases referred to as authority that in precisely similar cases a preliminary injunction ought not to go.

The present case differs from Maitland's and Hand's Appeals in this,

that the defendant dealt directly with the executor, and knew, or might and ought to have known, that the latter was using the securities of the estate for his own debts. This was a fraudulent conversion of the trust property to his own use by the executor; or, in technical language, an embezzlement. I am unable to see how any person who had either actual knowledge of that fact, or was affected with legal notice of it, could acquire any title to the stock.

The injunction is continued until the further order of the court.

[Leg. Int., Vol. 31, p. 148.]

ETTING et al. vs. LEVY et al.

A bill for discovery in aid of execution is a proceeding in equity, and should be printed, as required by the equity rules.

Opinion delivered May 2, 1874, by

ALLISON, P. J.—This is a bill of discovery in aid of an execution, upon which judgment had been entered against certain of the defendants, for want of an appearance and answers.

This judgment was afterwards opened, and a rule entered to answer interrogatories within twenty days, after which a rule was taken by defendants to set aside service of subpoena, and to dismiss the bill, and discharge rule to answer.

This last rule is founded on the objection, that the bill has not been printed, as required by the third equity rule.

It is set up in reply, that a bill of discovery in aid of an execution is not covered by the rule; that it is not in strictness a bill in equity, but that it is a proceeding connected with a suit at law, which, though taking necessarily the form of a bill in equity, is not covered by the requirement that all equity pleadings shall be printed. Under the act of June 16, 1836, discovery of facts material to a just determination of issues, and other questions arising or depending in the Supreme Court and Courts of Common Pleas of this State, is one of the specified grants of equity power. The allegation of the pendency of a civil action, under this clause of the act of 1836, lays sufficient ground for a bill of discovery, but the averment must be made that the discovery is sought in aid of some judicial proceeding, commenced or contemplated, and the purpose to be accomplished by discovery must clearly appear: 1 Phila. Rep. 484; *Pebbles vs. Boggs*, 1 T. and H. Prac. 92. It has not been questioned, that a proceeding under this clause of the act of 1836, giving in terms equity jurisdiction to the courts, falls under the rule which relates to printing, though it must be admitted that it contemplates the exercise of a more extensive power than discovery, in aid of trials of issues, as it is also intended to assist in the determination of other questions "arising or depending in the courts," and it would be doing no violence to this clause of the section to apply it to the ascertainment of the ownership of property upon which execution had been levied.

We think it is probable this would have been done by the courts, had not the Legislature, on the same day, passed another act, which has relation only to the kind of relief sought to be reached by the present bill. The right to file such a bill is specifically given; the persons who

may be made defendants are pointed out, and what it shall contain, as well as the mode of procedure under it, is given in detail.

Such a bill will lie to compel discovery of defendants' real estate without a previous execution, or of personal property after a return of *nulla bona*, or of money or choses in action: 10 Barr, 174; 2 Ash. 394; 2 Penna. L. J. 321.

Under this act it was held, in *Davis vs. Gerhard*, 5 Whar. 470, that the Supreme Court had not jurisdiction to afford relief in this form in aid of a judgment of the District Court. In *Gouldy vs. Gillespie*, 4 Penna. L. J., p. 91, the like power was denied to the District Court; and in *Clark vs. Rush*, 1 Phila. Rep. 572, it was decided, that this power was not given to that court by the act of 1854, giving to it concurrent jurisdiction in equity with the Common Pleas.

In *Davis vs. Gerhard*, the Supreme Court treat the two acts, though passed under different titles, as substantially parts of one act, which requires that they both be taken in view, in order to give a true construction to either of them, both relating to discovery. The strict construction given to the two acts is based wholly upon the fact that there is specific legislation given as to discovery relating to trials of issues, and equally specific legislation upon the subject of discovery after judgment. Judge Huston remarks, it is not necessary to inquire what might have been the extent of jurisdiction given by the first act, if it stood alone.

We are of the opinion, under the authority of these cases, that the distinction claimed for a bill filed in aid of an execution, cannot be maintained; that the rule which requires bills to be printed is applicable to all bills for discovery; that one proceeding is as purely a proceeding in equity as is the other, and that we cannot refuse to enforce the rule.

The defendants, however, have not been vigilant in standing upon their right in this respect; they have, upon a motion to open judgment, appeared to the bill as it was originally filed; we will therefore not make the present rule absolute until time shall have been given to print the bill, if plaintiffs choose to do so at this stage of their cause.

Luse and Foly, for plaintiffs.

Pratt and Shields, for defendants.

[Leg. Int., Vol. 31, p. 148.]

LAGROSSE vs. CURRAN.

Witnesses attending without subpoena, and not called to testify, are entitled to their costs, where a subpoena had been taken out but they waived its service, and where there was no allegation that their testimony was not needed.

Appeal from taxation of costs. Opinion delivered May 2, 1874, by ALLISON, P. J.—This was an action of replevin, in which double costs are claimed for fees of witnesses. Upon the trial of the cause the verdict was for the defendant, and his bill of costs has been allowed by the prothonotary. The cause went in favor of the defendant, upon the questions of law which were submitted to the court, upon the plaintiff closing his case, and none of the witnesses for whom costs are claimed were examined before the jury.

The most important of the exceptions taken to those costs is, that the attendance was voluntary, except as to one witness, who was duly subpoenaed.

There seems to be no reason to question the good faith of the defendant, in procuring the attendance of his witnesses at the trial; he expected to be called on to make a defence to the case as presented by plaintiff; it was his duty, therefore, to come to the contest prepared, with his witnesses ready to be called, and he might, with good reason, have anticipated that the cause would turn mainly upon a question of fact, as, to a right of way along a court or alley, which plaintiff alleged had been acquired by uninterrupted user of twenty-one years.

In *De Benneville vs. De Benneville*, 1 Binney, 46, it was held, that a witness subpoenaed, though not examined, or if examined, though not subpoenaed, has a right to be paid, and that a party has a right to call as many witnesses as he thinks are necessary to make out his case. The court will protect against oppression by needless multiplication of witnesses. This cannot be successfully charged in this case; the witnesses were five in number, four of whom attended court for five days, and one for four days.

This case differs from the rule laid down in *De Benneville vs. De Benneville*, in the fact that there was here, as to four of the witnesses, no service of the subpoena. But it is also the fact that a subpoena was taken out, the names of the witnesses inserted in it, and that personal service was waived when about to be made, and that they attended court after they were informed that a subpoena had been taken out for them. Fraud, oppression, or the slightest want of good faith has not been suggested. The fee bill gives compensation to witnesses for daily attendance upon court; it does not say anything about attendance in obedience to subpoena; if subpoenaed, there is an additional allowance for cost of service; this is necessary, to enable a party to compel attendance. The defendant, being liable to these witnesses for their cost, is entitled to the bill as it has been taxed.

Exceptions dismissed and taxation confirmed.

James Parsons, Esq., for plaintiff.

F. P. Curran, Esq., for defendant.

[Leg. Int., Vol. 31, p. 148.]

FITZPATRICK vs. PENNSYLVANIA RAILROAD.

When a deduction is made from the landlord's damages, under appropriation by the sovereign for the time the lease has to run, and awarded to the lessee, it in equity belongs to the lessor, as he is deprived of recourse to the land for his rent.

Opinion delivered May 2, 1874, by

ALISON, P. J.—The claim for damages in this case grows out of a power exercised by the Pennsylvania Railroad Company, to appropriate No. 5 Dock street for a freight warehouse, under the act of March 12, 1873, P. L. 253, which authorized the company to occupy portions of Delaware avenue for railroad purposes, and to take property convenient to said avenue for depot and other railroad purposes.

The property taken belonged to Patrick Fitzpatrick, to whom a jury

awarded damages in the sum of \$27,500, and to the tenant, Arthur O'Kane, they gave \$50 for his damages.

The railroad company afterwards presented their petition to the court, which states that O'Kane, the tenant, had not been notified to appear before the jury; had not been heard by counsel; nor had witnesses been produced to testify as to his claim. The prayer of the petition was, that the report be referred back to the jury, that the tenant might be heard before them. This was granted, and the jury have now brought in a second or amended report, giving to the tenant the sum of \$1,500, but deducting the amount from the \$27,500 previously awarded to Fitzpatrick. To this Fitzpatrick excepts; he denies the right or power of the jury to reconsider or change the award which they had made to the exceptant, in their first report, which was filed on the 19th of September, 1873.

In *Dyer vs. Wightman*, 16 P. F. S. 425, the principle applicable to this case is clearly settled. It holds that when land is taken or appropriated by the sovereign, the landlord is entitled to the value of the reversion subject to the term, and the tenant is entitled to the value of his term, subject to the rent then due and to become due under his lease, and such further damages as he has sustained. But when rent is deducted from the lessor's damages, for the time the lease has to run, and has been awarded to the lessee, in *equity*, it belongs to the lessor. The viewers ought to award this to the landlord, and not to the tenant, the tenant being thereby released from his personal obligation to pay rent.

This is evidently just what the jury did, when the questions were first before them; they gave to Fitzpatrick the value of the estate in reversion, and the rent which the tenant had agreed to pay for the eighteen months which remained of his term. If they had made the award in the first instance as they have now done, that is, taken \$1,500 from the value of the landlord's estate in the land and given it to the tenant, the court would have set the report aside, or sent it back for amendment, with instructions. We are justified in inferring that the award as first made to Fitzpatrick was the value, as it was ascertained by the jury, of his entire interest in the property, inasmuch as the finding was not excepted to by the Pennsylvania Railroad Company, they were satisfied with the value as fixed by the first report, and it is only when the tenant appears as a claimant, at a subsequent stage of the cause, that they raise a question as to appropriation of the \$27,500, as between the landlord and the tenant. That the sum first awarded to the owner of the fee in reversion is not more than the estate is worth, must be regarded as assented to by the company; there has not to this hour been an exception filed, that alleges this award to him to be excessive; with the case as it now stands before us, we must regard the second report as a division merely of the value of the two estates, which in effect finds the landlord's estate up to the time of the appropriation, to be worth \$26,000, and that the unexpired portion of the term of the lessee is worth \$1,500; *Dyer vs. Wightman* settles the question, that both of these sums belong to the landlord. The question is put and answered in this form. When this deduction is made from the value of the land in damages awarded to the lessor, for the time the lease has to run . . . to whom in equity does the money thus awarded to the tenant belong?

Evidently to the lessor. It is decreed to the tenant to enable him to meet and discharge his personal covenant to pay rent, according to the stipulations of his lease; surely equity would not suffer him after having received and pocketed the amount, to snap his finger at his landlord and walk off. Not only courts of equity, but all other tribunals in Pennsylvania, proceed upon principles of equity; they are bound to consider that actually done, which a chancellor would decree to be done. It follows from this, that if a chancellor would regard damages awarded to a tenant, to indemnify him against his covenant to pay rent, as in equity the money of the landlord, and decree it to be paid to him, *a jury of view to assess damages ought at once to award it to him*. It is very clear, therefore, that the jury had no right to alter their original finding, so as to take from the landlord that which belongs to him, and give it to the tenant, in the language of the case cited above, it enables the tenant to snap his finger at his landlord, and walk off with the money in his pocket, and turns the landlord over to his action at law against the tenant. In support of the principle on which *Dyer vs. Wightman* is decided, there is cited *Foots vs. The City of Cincinnati*, 11 Ohio, 408; *Parks vs. The City of Boston*, 15 Pickering, 198; *Folts vs. Huntley*, 7 Wendell, 210.

The tenant has a right to claim compensation for all damages he may have sustained, by reason of any injury done to him by this act of the company. In *Dyer vs. Wightman* the court say, if the tenant has the value of a pepper-corn in the lease (independent of the rent), he is entitled to recover. The same principle is decided in *Railroad vs. Boyer*, 1 Harris, 497. See opinion of Jones, P. J., affirmed by the Supreme Court.

Upon consideration of the two reports we make the following order: So much of the report filed September 19, 1873, as awards to Patrick Fitzpatrick, the sum of twenty-seven thousand five hundred dollars, as his damages for property No. 5 Dock street, is hereby confirmed. The award of fifty dollars to the tenant of the premises, Arthur O'Kane, is set aside.

The second report of the viewers, filed March 20, 1874, is set aside, and the matter is referred back to the jury, to examine into, and report upon the claim of the said Arthur O'Kane, tenant, for damages which he may be able to show he has sustained by the taking of said premises, No. 5 Dock street, by the Pennsylvania Railroad; excluding, however, all claim for, or apportionment of rent paid, or due to Fitzpatrick under the lease.

The exceptions which do not apply to the awarding of a portion of the damages given to Fitzpatrick to the tenant, are not well taken, and are dismissed.

David W. Sellers, Esq., for the landlord.

Chapman Biddle, Esq., for railroad company.

[Leg. Int., Vol. 31, p. 148.]

BRINCKLE vs. BRINCKLE.

A libel may state that the marriage was contracted in the month of January, but the respondent has the right to call for a particular statement of the exact time, manner, etc.

In divorce. Opinion delivered May 5, 1874, by

ALLISON, P. J.—The contest in this case is over the fact of marriage; as we have good reason to know, two demurrers to the libel have been sustained after protracted contest, over the sufficiency of the allegation of marriage. The libel as it now stands has been amended, so as to charge in distinct terms, that in the month of January, 1857, a marriage was contracted and celebrated between libellant and respondent.

This, under the decisions touching the form and essential averments of a libel for divorce under our Pennsylvania statutes, is a sufficient statement of the case of the libellant, if the respondent should be satisfied to allow his case to be determined upon the libel, without exercising his right of calling for a bill of particulars, or notice of special matter. The cases recognize such a bill as not only regular, but where the cause is defended, as the proper thing to be done. It tends to narrow the issue, and to certainty of disputed material averments. This was early announced as the correct practice under our law: *Garratt vs. Garratt*, 4 Yeates, 244, and has been steadily followed down to the recent case of *Hancock's Appeal*, 14 P. F. S. 471. In *Breinig vs. Breinig*, 2 Casey, 161, where the averments of the libel were general, asserting a refusal to cohabit, and the offering of such indignities to the person of the petitioner, as rendered her condition intolerable and life burdensome, and by cruel and barbarous treatment, forcing her to withdraw from respondent's house and family. The court say, that if a more specific statement had been desired, the respondent ought to have called for a specification of the matters intended to have been proved. The right to make such call is clearly recognized in *Hancock's Appeal*, and *Breinig vs. Breinig*, although in each of the cases a divorce was sustained upon the general allegations of the libel, which, in themselves, were specific enough to meet the requirements of the statute.

Just what the court held the respondent could have done, in the cases mentioned, the respondent has elected to do here; he denies the fact of marriage, and asks for a specification of time, place and circumstances; his call is for a distinct statement of the day and place upon and at which the marriage, which he calls a pretended marriage, is alleged to have been celebrated; the name of the person by whom it was celebrated; together with the names of the witnesses who she may assert were present at the alleged celebration of the marriage rite.

There does not appear to be anything unreasonable in this call; libellant claims that she was married to respondent in January, 1857; if such rite ever was celebrated between herself and her asserted husband, it was done in some place of which respondent must have knowledge; if witnesses were present, she is presumed to know who they were. She ought to be able to state the date of her marriage with greater certainty than to aver generally that it took place in the month of January,

1857; and if she is unable to state where and by whom married, and what persons witnessed the ceremony; just what the facts are, upon which she intends to rely to make out this material part of her case, she ought to state with particularity. The respondent should not be required to meet the issue tendered by the libellant, without being fully warned, that he may properly prepare his defence. We paused over the demand for the names of libellant's witnesses, but a moment's reflection on this point, removed all hesitation, remembering that it is in strict conformity to our rule, in all cases decided upon testimony taken before an examiner.

Rule absolute.

Charles W. Katz, Esq., for libellant.

Hon. F. C. Brewster, for defendant.

[*Leg. Int.*, Vol. 31, p. 164.]

OPENING OF STREETS THROUGH GIRARD COLLEGE GROUNDS.

The act of June 21, 1873, authorizes the opening of Girard avenue and Twenty-second street through Girard College grounds, and is constitutional.

LUDLOW, J., dissents.

In the matter of the petition to open streets through Girard College grounds.

Opinion delivered *May 16, 1874*, by

FINLETTER, J.—Does the act of June 21, 1873, authorize proceedings to open the streets named therein?

It is entitled an "act providing for the opening of Girard avenue and Twenty-second street through the grounds of Girard College." The Governor in signing the bill, says: "The charity whose lands may be sought to be invaded under the act, etc., . . . yet as the constitutional objections I had to the bill have been removed, by providing expressly therein, that before any action is taken to open any street through the grounds, the constitutionality of the power thereby conferred may be first determined by the courts of the Commonwealth, etc."

Evidently the Legislature intended, and the Governor believed, that the act authorized the opening of the streets. It should, therefore, if possible, be construed in conformity with this intention. Certainly we should not be astute to defeat its avowed purpose.

Without punctuation the act is as follows: "That upon the petition of ten or more citizens of the city of Philadelphia to the Court of Common Pleas of said city petitioning said court for a jury of view to examine and report to said court for or against the opening and straightening of Girard avenue through Girard College grounds and to open Twenty-second street from North College avenue to Poplar street said court shall if under the provision of the will of Stephen Girard deceased and existing legislation essential to the faithful execution of the trust thereby created it is within the power of said court to grant the prayer of the petitioner appoint a jury of view in accordance with the existing laws to examine and report to said court for or against opening and straightening Girard avenue through Girard College grounds or for or against

opening Twenty-second street from North College avenue to Poplar street."

It will be conceded that the act directs us to appoint a jury of view, "if under the provisions of the will of Stephen Girard, deceased, and existing legislation essential to the faithful execution of the trust thereby created, it is within the power of the said court." This cannot mean that the power to appoint the jury must be derived from the will or from the legislation essential, or from both combined. It cannot be supposed that the Legislature would do so vain a thing as to remit us either for authority or for a denial of it to wills or statutes which are silent upon the subject. The "legislation essential," etc., it will be understood is simply the enforcement of the will, and therefore lends no additional authority to the will itself. It was, however, quite competent for the Legislature to say that we should have this jurisdiction if it did not conflict with the trusts of the will; or if it was consistent with that trust. Again, the Legislature might say that the authority should be exercised if the trust of the will, reinforced by essential legislation, could be faithfully executed, notwithstanding. Under either of these aspects we would be impliedly forbidden to exercise the authority, if it interfered with the faithful execution of the trust, and therefore we would not have the power to do it.

If, however, under the will and necessary legislation the trust can be faithfully executed, subject to the act of 1873, then there is no prohibition, and it is within the power of the court to appoint a jury as requested.

Obviously the sole object of the condition of the act is to save the trust in all its present efficacy. If this cannot be done, then it is not "within the power of the court to grant the prayer of the petitioners." We have no power to do anything under this act which is inconsistent with the faithful execution of the trust. It follows, however, as a corollary from this, as well as from the whole act, that we have the power to do whatever is in keeping with the trust. Moreover, if we believe we have the power, we are expressly commanded to exercise it. "Said court shall appoint a jury of view," etc.

There is no legislation with which it is pretended that the act of 1873 is in conflict, save the 11th section of the act of 24th March, 1832, which is as follows:—"That no road or street shall be laid out or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors of said college, and approved by a majority of the select and common councils of the city of Philadelphia."

It will be seen that this legislation is not essential to the trust, unless, 1st, the trustees were by the will required to prevent the opening of streets; and 2d, had the power to do it. A trust is a duty imposed and accepted. That duty, however, must accord with the law; and when it comes in conflict therewith it is annihilated. Now, it will be admitted that there is no express direction in the will upon this subject, and, as will be seen hereafter, there is no implied direction. But even if the duty had been expressly imposed, it must stand confessed that it was one which the trustees could not enforce against the Legislature. It would, therefore, cease to be a trust when opposed by an act of

assembly. It would then exist only as a duty binding on the trustees in their individual or official capacities. It would follow from this that the act of 23d March, 1832, is not legislation essential to the faithful execution of the trust created by the will of Mr. Girard.

We will now consider the trust under the will. Its first obligation is the erection of the buildings in accordance with the directions of the will. Have not the trustees carried out those directions; and is not the trust in this respect faithfully executed, and therefore ended? It may be conceded that impliedly it is their duty to keep the "establishment" in this condition; but not against the sovereign power of the Commonwealth.

The college having been erected and organized, and being now in full operation, what is the trust which remains? It is, first, the selection of teachers and agents, in all cases to be chosen on account of their merit, and not through favor or intrigue. Second. Receiving certain orphans. Third. Maintaining, educating, and controlling them in the manner prescribed. Fourth. Taking care of the fund. Fifth. Carrying into effect the provisions of the will: "Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatever, shall ever hold or exercise any station or duty whatever in said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purpose of the college."

These are all the incidents of the trust. We cannot see how granting the prayer of the petition can affect the faithful performance of each and all of them. They could be performed as well in any other place, or in any other buildings, if any necessity should dispossess the trustees of the buildings and the lands whereon they are erected.

We therefore conclude that it is "within the power of the court to grant the prayer of the petitioners," and we must do so, unless otherwise prevented.

Mr. Girard bequeathed to the Commonwealth, under certain conditions, \$300,000, which she accepted. It is contended that the "State is estopped by the acceptance of this legacy from passing the act of 1873." "It was the manifest intention of the will that the college grounds should be preserved as an unbroken whole, and that their privacy should be unmolested."

Passing by the doubt that the doctrine of estoppel can apply to the Commonwealth in the exercise of her legislative functions, we will proceed to consider this point. The language of the will upon which this position is predicated is: "So that the establishment may be rendered *secure and private*." In considering this language, it should be remembered that Mr. Girard was establishing a college in which professors and pupils should reside as free citizens, and not a prison, in which they should be immured from the light of humanity. The security and privacy of the lecture-room, the dormitory, refectory, and of an institution of benevolence and learning, differ widely from the security and privacy of the cell and dungeon of the penitentiary. It is evident that precisely the same security and privacy which the testator contemplated for his "establishment" at its original site, Twelfth and Chestnut, can be had where it now stands, even though every street which meets it should be extended through its grounds. What is to prevent each square

from being enclosed as the whole plot of forty-five acres is now enclosed?

We understand "election," as applied to wills, to be either a choice between adverse interests or the refusal to take under a will.

The only interest which the Commonwealth had under the will of Mr. Girard was the legacy of \$300,000. This she could not receive until she had complied with the conditions upon which it was given. How, then, can the doctrine of "election" apply to her? There is no implied duty upon him who accepts a legacy to enforce the duties and responsibilities of other persons under the will.

In her sovereign capacity, "it is the right as well as the duty of the State, by her courts and public officers, as also by legislation, if needed, to have the charities properly administered." As legatee she stands precisely as any individual.

If Mr. Girard had intended that no street should be opened through the college ground he should have said so. If he had intended that restriction upon the Commonwealth, there was nothing easier than to make it one of the conditions upon which the legacy was to be paid. We do not think the State is "estopped by her acceptance of the legacy from passing the act of 1873."

It is further contended that "the act of 1873 is clearly unconstitutional." The 10th section of Article 1 of the Constitution of the United States, provides that "no State shall pass any law impairing the obligation of contracts." The argument is, "in the present case the parties to the contract are Stephen Girard, the donor; the city of Philadelphia, trustee; and the Commonwealth of Pennsylvania. Upon the confidence that the trustee would faithfully execute the trust, and that the Legislature, with watchful care, would at all times see that his intentions were carried out, Stephen Girard left the bulk of his property to the city, in trust, to found and maintain the college."

It may be conceded that the testator relied upon the Commonwealth to enforce her laws in relation to last wills and testaments, and that he was, thereby, solely induced to leave his property to the city. But how does all this impose upon the Commonwealth the obligation of a contract with him or any one else?

The authorities cited upon the argument certainly do show, what no one at this time doubts, that an act of the Legislature creating a private corporation is a contract. They do not, however, show that an act providing for the opening of a public highway in a particular manner is a contract, that for all time shall be the only way in which the highway may be opened.

It might, perhaps, have been wiser for us upon this point to have relied wholly upon the emphatic language of Justice Sharswood, which is: "Mr. Girard left three hundred thousand dollars to the Commonwealth, to be applied to the purpose of internal navigation, on condition that certain laws should be passed as to Delaware avenue, Water street, and wooden or brick-paned buildings. The money was accepted and the laws were passed. They stand unchanged and unrepealed on the statute book. No alteration or modification of them, by any of the provisions of this act, has been or can be pointed out. It is a contract, if a contract at all, completely executed and fulfilled on both sides:" *Philadelphia vs. Fox*, 14 P. F. S., p. 189.

If, however, the Legislature had power to contract, and did thus contract, what then follows? Not that the Commonwealth cannot exercise her right of eminent domain, but that she cannot do so without compensation. To this extent the decisions reach, and no further. As was well argued, there can be no higher right than that by which the humblest citizen holds his land; and yet before the exercise of eminent domain it falls into a mere right of compensation.

Aside from all this, what is the act of 1832 but the assertion and the exercise of the right to open streets through the college grounds? That they may be opened in the manner therein provided no one will deny. How then can it be contended that it is a contract not to open the streets at all?

The adoption of a particular means to do a thing, does not necessarily imply a surrender of all others. If such were the result, then all legislation would cease upon subjects upon which legislation now exists; and all rights of person and property must be enforced hereafter just as they are now enforced.

We have come to the conclusion that there is nothing in the act of 1832, or in the trust under the will of Mr. Girard, to prevent the opening of the streets named in the act of June 23, 1873.

The prayer of the petitioners is therefore granted.

Dissenting opinion delivered by

LUDLOW, J.—A petition was filed in this case praying the court to appoint a jury of view, who shall examine and report upon the propriety of opening certain streets through the grounds of Girard College.

Many questions were ably argued by the counsel concerned in the case, and two of them embraced principles of law involving the whole doctrine of the obligation of legislative contracts under the Federal Constitution, and of the exercise of the right of eminent domain by the supreme legislative authority of the Commonwealth.

A careful examination of the act of June 21, 1873, will, I think, establish the fact that the two propositions above referred to do not arise in this case, and therefore cannot now be decided.

Whatever may have been the intention of the parties interested in obtaining this legislation, the Legislature have seen fit to insert in the act passed two conditions, and subject to these we may act, and not otherwise. The court may appoint a jury of view, if it has the power "under the provisions of the will of Stephen Girard, deceased," and "existing legislation essential to the faithful execution of the trust."

I find nothing in this act which either directly or indirectly looks to a breach of any contract made or supposed to have been made with the Commonwealth.

If the power of the court is to depend upon the provisions of the will and existing legislation, surely both are to be considered in determining the cause, for both are distinctly recognized in the act of assembly.

If the proposition above stated be true, it follows as a logical consequence that the Commonwealth has not attempted to exercise the right of eminent domain. If the act of assembly had simply declared that the land, or a portion thereof, belonging to the college, was to be taken for a public use, and had repealed existing legislation upon the subject,

very serious questions would have presented themselves for our consideration. Now, however, I look in vain through this act, either for a direct or indirect repeal of former laws relating to the subject, or for the assertion of that supreme power which it is alleged resides in the State.

This act does nothing more than direct the court to act, unless the provisions of Mr. Girard's will and existing legislation essential to the execution of the trust prevent it. Before I proceed to consider the real questions at issue before us, it is as well to remark, that we are not now called upon to determine the general questions which arise under this will, in so far as they relate to the general duties and powers of the trustees with reference to other properties belonging to the Girard estate. These trustees may have authority to sell or lease portions of the real estate belonging to the trust; questions have arisen and been decided by this court in relation to this very subject. Never before has an attempt been made against the will of the trustees, to interfere with the grounds of the college. Other real estate has been leased or sold; here, however, without and against the judgment of the trustees and existing legislation, an effort is made to run streets through ground distinctly specified, and specially set apart by the testator for a specified purpose.

That the power claimed for the court does not exist, will, I think, appear—

1. Because the terms of the will and the duties of the trustees forbid the exercise of any such power.

2. Because existing legislation, with the light thrown upon it by its contemporaneous history, prohibits it.

3. Because the combined effect of the provisions of the will and all previous legislation must be fatal to the existence of the power claimed for the tribunal.

- I. The great object of Stephen Girard was to establish a charity, and to endow it munificently. The whole will is an overwhelming proof of this assertion; incidentally the testator bestowed his benevolence upon a number of individuals and municipalities, but the 24th clause of his will, whereby he disposes of his residuary estate, abundantly proves what his intention was, when he directed that the income of the permanent fund to be created, should *first* be applied to the improvement and maintenance of the college, as directed in the last paragraph of the 21st clause of the will.

What provision had he then made for this the grand object of his benevolence?

By the will we find that a square had been selected in the city of Philadelphia. Upon the square the buildings were to have been erected, and the testator in the most minute details describes precisely in what manner these buildings should be built, while the whole property is to be surrounded with a solid wall; and the object of all these special directions seems to have been, to render the establishment "secure and private," an idea utterly incompatible with the location of streets upon any part of the college grounds. Nor is this all: the will, in so far as it relates to the college and its management, establishes, as it were, a chart, by which the trustees shall be governed.

The codicil of June 20, 1831, simply transfers the college buildings to the estate purchased by testator from William Parker, called Peel

Hall, on the Ridge avenue, in Penn township, subject to all the provisions of the will in relation to the square formerly designated as the site for the Girard College. Doubtless the very object of the testator in making this codicil was to avoid the difficulty which now presents itself to our notice. Under the 21st section of the will, it is, among other things, provided, that "such further sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund."

Here, then, in brief, we have a trust, by which (in so far as the will and the duties of the trustees are to be considered) acres of ground have been selected and dedicated, buildings erected, an institution established, and the trustees specially directed, to erect as many new buildings as the ground shall be "adequate to," and the funds of the estate will justify.

It seems to me too clear for argument, that under the provisions of this will the trustees must maintain inviolate, the grounds now occupied by the college, and enclosed in accordance with the directions of the testator, at least, in so far as, in their judgment, it is necessary so to do for the purposes of the college. Nor can they, without a violation of the trust, yield, except to an overwhelming power, legally exercised.

If the duties of the trustees are clear, by what authority can this court, *under the provisions of this will*, interfere, and by a decree break or injure the administration of this trust? The language of the late Judge Grier, in *Girard vs. Philadelphia*, 7 Wallace, 15, is to the point; that distinguished judge said: "Charity never fails; and it is the right, as well as the duty, of the sovereign, by its courts and public officers, as also by legislation, if needed, to have the charities properly administered."

Charged as we are in this tribunal with abundant supervisory powers over trustees, we should be the last to lend a willing ear to an interpretation of this act which might imperil the existence or administration of the trust, when, by the words of the law, we are bound to respect the provisions of the bill.

II. Existing legislation, with its contemporaneous history, clearly prohibits the exercise of the power now claimed for this court.

We have referred to the history of the legislation now upon the statute book, with reference to the Girard estate, and this history will, we think, have a very important bearing upon the solution of the question before us, and of any question relating to this trust which may hereafter arise.

In the fourth annual report of the Directors of the City Trusts, we find a letter (pages 35, 36) from the executors of Mr. Girard to the mayor of Philadelphia. In this letter the executors "call the attention of councils to the importance of an early attention to the premises referred to, in connection with the streets which it may be proposed to open in Penn township, through any part of the said forty-five acres."

This letter seems to have been the basis for all subsequent legislation, municipal and State.

The councils directed a copy of the will to be sent to the Legislature,

January 12, 1832, and on the 24th of March, of the same year, the act of assembly was passed, entitled "An act to enable the mayor," etc., etc., to carry into effect certain improvements, and execute certain trusts.

This statute, among other things, declares the object of the law to be "to effect the improvements contemplated by the testator, and to execute in all other respects the trusts created by this will."

The acts of the executors, of the then mayor of the city of Philadelphia, and of the Legislature of the Commonwealth, all prove how anxious and prompt all then were to give legal effect to the will of Mr. Girard, including all the trusts created by the will; and the history of the period establishes the fact, that not only did the mayor and councils of the city understand the necessity for immediate legislation, under the terms of the will, but the Legislature, thoroughly informed upon the subject, not only legislated with a view to obtain the legacy contained in the will, but also by a general grant of power to the municipality most interested, gave the amplest jurisdiction over the whole subject-matter of the trusts contained in the will. This act of assembly was called by Judge Story, in *Vidal vs. Girard's Executors*, 2 Howard, 128, "a legislative exposition and confirmation of the corporation (the city) to take the property and execute the trust." Without now intending to decide how far a contract has been created which cannot, without a violation of the federal Constitution, now be broken, enough certainly appears to prove incontrovertibly why the legislation of the State was considered essential to the faithful execution of the trust, and why, in particular, the eleventh section of the act of March 24, 1832, was passed, which expressly declared "that no road or street shall be laid out or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees of said college, and approved by a majority of the select and common councils of the city of Philadelphia." With such legislation as this before us, and with a full knowledge of the fact that Mr. Girard intended the college to be secluded, how we can now, by virtue of an act of assembly which directs us to regard the provision of the will and existing legislation, permit streets to be opened through the grounds, I am absolutely unable to understand.

III. After what has been already said, it is unnecessary to do more than call attention to the combined effect of the provisions of this will and existing legislation essential to the execution of the trust. If the court has no power to act upon this petition under the provisions of the will, and none whatever in view of all previous legislation upon the subject, how improper and even impossible is it for us to grant the prayer of this petition, against the combined effect of the expressed will of the testator, and the command of the sovereign legislative authority of the Commonwealth.

I dissent from the judgment of the majority of the court, and I do so with more earnestness, because, by the report of the trustees, it is evident that in a short time the funds in hand will enable the trustees to educate over one thousand pupils, provided the will of the testator is not disregarded, or practically ignored or destroyed.

E. Spencer Miller, Esq., for the petitioners.

Hon. F. Carroll Brewster, for the college.

[Leg. Int., Vol. 31, p. 196.]

VANARSDALEN vs. WHITAKER.

Equity will not restrain a proceeding by landlord against tenant for possession upon grounds, such as change of title, which may be asserted by the tenant in the proceeding itself.

In equity. Motion to dissolve special injunction. Opinion delivered June 10, 1874, by

PEIRCE, J.—This bill is filed to restrain the defendant, Robert Whitaker, from proceeding at law as landlord under the act of 1830, to recover possession of the premises No. 250 South Sixth street.

The plaintiffs allege that they are not tenants of Whitaker, but that they are vendees in possession of the premises under a contract of purchase of them from him. If so they can defend at law in the proceeding to recover possession by showing that the relation of landlord and tenant does not subsist between the parties; or that if it did, it has been determined by the contract of purchase, and possession under it, which they now set up as the ground of this bill.

The remedy sought by the plaintiff in the landlord and tenant proceeding is purely legal, and the defence is purely legal. There is no reason, therefore, why a court of equity should interfere.

It is unnecessary, and therefore improper, to express any opinion in this proceeding as to the legal effect of the papers on which the parties respectively rely, or on any of the questions which may arise in the proceeding before the alderman. The special injunction is dissolved.

Wm. L. Hirst, Esq., for plaintiff.

Hon. F. Carroll Brewster, for defendant.

[Leg. Int., Vol. 31, p. 204.]

LODGE vs. RAILROAD

To permit, even after three trials, a verdict to stand without evidence, is to plunder a citizen under the form of law.

Rule for new trial. Opinion delivered June 13, 1874, by

FINLETTER, J.—From the evidence two questions arose for the determination of the jury; they were:

1st. Had the plaintiff granted the right of way through his land?

2d. If he had not, what damage did he suffer?

Six witnesses of unimpeachable integrity and intelligence testified that the plaintiff had given the right of way for the consideration of a change of location and a turn-out.

This testimony was not contradicted by the plaintiff, except that he said one of the employees of the road had promised to build him a storehouse. It was therefore a conceded fact that the location had been changed to accommodate him. There was no evidence that the defendants had neglected or refused to build the turn-out or the storehouse before this suit was brought. If then the plaintiff's testimony upon this point is to be preferred, he has no cause of action, because his special contract fixed and determined the measure of damages. The act of

assembly under which this suit is brought, provides only for cases in which the parties have not agreed. The agreement having been complied with in part by the defendants, the plaintiff could not rescind it until the defendants had either neglected or refused to perform what remained for them to do.

The land taken by the defendants, about one and three-quarter acres, was not arable, and only a small portion of it was fit for pasturage. It could not be used for building purposes because it was subject to a servitude of entry for stone and earth for repairing the raceway and dam. This servitude was upon all the land of the plaintiff, and no portion of it could be considered as building lots. There was no reliable evidence of the value of the land taken; and no evidence of special damage to any portion of the land not taken.

The witnesses for the plaintiff fixed the damages from \$15 to \$50,000. All of them, however, admitted that they did not know the value of the land in controversy, or the value of property in the neighborhood. How then could they properly estimate the damages? What more was their testimony than a guess? Even if they had known the value of the land before and after the location of the road, two errors entered into their estimates which necessarily vitiated them. The principal one was that they considered the whole land as building lots, when the fact is it cannot be used for such purposes. The other was, that the road ran through the plaintiff's lawn. He says it did not. A witness who fixes the damages at \$25,000, estimates the damages to the lawn at \$6,500. Another witness says: "Mr. Lodge's property had a value almost equal to city property. The course the railroad takes destroys all the points that Mr. Lodge intended for building houses on. He certainly has lost from \$40,000 to \$50,000. My impression is, that the railroad took part of Mr. Lodge's lawn." Another considers the damages \$40,000, no matter what the value of the land was. Such is the tenor of all the testimony for the plaintiff.

It was established by the witnesses, both of plaintiff and defendants, that there was no damage to the mill property or to the business of plaintiff. Damages could therefore arise from loss of land, and the depreciation of land not taken. There was no proper evidence from which such damages could be estimated. In reference to the mansion and ground appurtenant, about two acres, the plaintiff called two witnesses who had offered him \$30,000. One offer was before the railroad was built, the other was shortly after it was in running order. It was thus conclusively established that the mansion was not injured.

There was, therefore, no evidence upon which the verdict could rest. To say that it is without evidence, is to consider it mildly.

In addition, I erred in permitting a map to be exhibited to the jury upon which the whole of the plaintiff's land was marked out in building lots, and also in permitting the witnesses to value the land for building purposes. These matters necessarily misled the jury. Aside from all this the counsel of the plaintiff, in argument, without evidence, charged upon the defendants the burning of the plaintiff's mill and his bankruptcy.

If the testimony had brought home to the defendants these facts, they were wrongs for which the plaintiff could not recover in this action.

We must consider that these arguments were intended to influence the jury, and that they had that effect. For this alone, even if the verdict could be supposed by the evidence, we would be compelled to set it aside; such victories must be barren if our rights are to be measured by law and evidence.

I am not unmindful that three juries have passed upon this controversy, and that another wasted seven days in its consideration, and that it may come again. But to permit a verdict without evidence to stand, is to plunder the citizen under the forms and solemnities of the law, and under the pretence of administering justice. If a hundred juries will insist upon depriving a suitor of his property without evidence, no matter how great or how small the wrong may be, it will be our duty to prevent it.

The rule for a new trial is made absolute.

Joseph I. Doran and I. Newton Brown, Esqs., for plaintiff.

Chapman Biddle, Esq., for defendants.

[Leg. Int., Vol. 31, p. 212.]

McNAIR *et al.* vs. CLEAVE *et al.*

If plaintiffs' firm-name falsely imply that they are a corporation, a court of equity will not assist them.

In equity. Bill for injunction to restrain infringement of trade-mark. Plaintiffs claimed the name of the "Galaxy Publishing Company," as a trade-mark.

Defendant replied that there was no "company" in the proper sense of the term, and that the pretence of a company organization was a fraud upon the public.

For the plaintiffs, it was argued that copartners had the right to trade under such a firm-name.

For the defendants, it was contended—

I. The word "company" implied *ex vi termini*, a corporation.

"Generally, the fact of an aggregate body being called by a name, is *prima facie* evidence that they are incorporate, for the name argues a corporation:" *Norris vs. Staps*, Hobart, 211.

"The names of the corporations are given of necessity, for the name is as it were the very being of their constitution, for it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts, for it is nobody to plead and to be impleaded, to take and give until it hath gotten a name:" *Bac. Abridg. sub. Corp.*, C. 1. "The name of the corporation is as the name of baptism:" 2 Inst. 666.

"Persons who, without the sanction of the Legislature, presume to act as a corporation, are guilty of a contempt of the crown, by usurping on its prerogative:" *Duvergier vs. Fellows*, 5 Bing. 268. "None can erect a company for trade but the king:" *East India Company vs. Sandys*, Skinn, 223.

Presuming or pretending to act as a corporate body, is spoken of by the Legislature as a known offence, in 6 Geo. I., C. 18, S. 19.

II. If the name involve a falsehood, a court of equity will not interfere: *Palmer vs. Harris*, 10 P. F. Smith, 156.

Opinion delivered *June 27, 1874*, by

PAXSON, J.—The plaintiffs allege that they are copartners, trading as the "Galaxy Publishing Company;" that they are entitled to the exclusive use of the said name as a trade-mark; that the defendants are also copartners under an agreement duly recorded, in which they style themselves "The Galaxy Publishing Company, Limited." The plaintiffs claim that the use of this name by the defendants is an infringement of their rights, and seriously interferes with their business. The application is for a preliminary injunction to restrain the defendants from the further use of said trade-mark.

The plaintiffs are not in a position to invoke the aid of a court of equity. The name which they have adopted, with their manner of using it, is a fraud upon the public. The words "Galaxy Publishing Company," implies that they are incorporated. As if purposely to strengthen this impression, the plaintiffs add to the name just cited the words, "William McNair, president, and Charles Robson, secretary and treasurer." This appears printed upon their envelopes, bills, letter-heads, etc. President of what? Treasurer of what? It would seem to be difficult to understand, from the sounding title and official display of names, that there was nothing behind it all but two gentlemen doing business as copartners.

It may be that no actual fraud was intended, and that the adoption of the name, and designation of officers was regarded by the plaintiffs as a mere device which would harm no one and might benefit them.

I give them the benefit of this doubt. It does not, however, help their case. A court of equity will assist no one in carrying on such a scheme as this. The familiar rule that he who seeks equity must do so with clean hands, is decisive of this motion.

Injunction refused.

Thomas J. Ashton, Esq., for plaintiff.

[*Leg. Int.*, Vol. 31, p. 212.]

COMMONWEALTH *ex relatione* ATTORNEY-GENERAL vs. BANK OF AMERICA.

Where the attorney-general is the relator, a writ of *quo warranto* will issue in the first instance, and a preliminary rule to show cause should not be required.

Opinion delivered *June 27, 1874*, by

PEIRCE and PAXSON, JJ.—In this case upon filing a suggestion for a writ of *quo warranto*, the court allowed a rule to show cause why the writ should not issue upon the return of the rule. The attorney-general appeared by deputy, and submitted to the court, that under the well-settled practice he was entitled to the writ in the first instance, without the formality of a rule, or even of an *allocatur*.

For the Commonwealth, it was argued that where the attorney-general is the relator, the practice is unaffected by the act of 1836, and continues as at common law. And reference was made to 3 Stephen's N. P. 2433; *Commonwealth vs. Burrell*, 7 Barr. 34; *Murphy vs. Bank*, 8 Harris, 415.

For the respondents, reference was made to *Commonwealth vs. Jones*, 2 Jones, 365, and *Commonwealth vs. Cluley*, 6 P. F. Smith 270; and it was further contended that the rule having been issued, respondents were

entitled to the benefit of their answer, which had already been filed. After argument, leave was given to withdraw the rule and answer, and a motion was made that the writ issue forthwith.

Opinion delivered *June 30, 1874*, by

PAXSON, J.—Upon the application of private counsel, and the filing of a suggestion signed by the attorney-general, we granted a rule to show cause why a writ of *quo warranto* should not issue in the above case.

On Saturday last, the return day of the rule, the deputy attorney-general appeared personally in court and asked leave to withdraw the above rule. Permission was given him to do so, and he now moves the court for a writ of *quo warranto*, without the preliminary rule to show cause.

There is no question as to the power of the court to allow the writ without a rule. It is sometimes done in the case of a private relator, though such has never been our practice, the motion to quash being considered equivalent to a rule to show cause, and less cumbersome.

When the writ is applied for by the attorney-general, the practice is to allow it without the rule. He is the law officer of the Commonwealth, representing a co-ordinate branch of the government, and is presumed to be as impartial as a judge.

But where the application comes from private counsel, even though the suggestion is signed by the attorney-general, it has not, heretofore, been our practice to allow the writ without a rule. We accept the appearance in court on Saturday of the recognized deputy of the attorney-general as an assurance that the object sought in this proceeding is a public one, and the writ of *quo warranto* is therefore allowed.

Deputy Attorney-General *Gilbert, Samuel Dickson, and J. C. Bullitt*, Esqs., for the Commonwealth.

Hon. *Wayne McVeigh*, and Messrs. *Dechert, Penrose, and Fletcher* for the bank.

[Leg. Int., Vol. 31, p. 244.]

ROBERT MCAFEE vs. HENRY BUMM, Collector of Outstanding or Delinquent Taxes.

The act of March 24, 1870, creating the office of collector of delinquent taxes, does not authorize the collector to sell the goods of a tenant for taxes due by the owner. The collector has only the power given him in this act.

Opinion delivered *July 25, 1874*, by

ALLISON, P. J.—The plaintiff is tenant and occupier of premises No. 1903 Columbia avenue, of which premises Tatlow Jackson is owner.

The defendant, by his deputy, has levied upon the household goods of the plaintiff, on the premises, for the purpose of collecting the sum of \$271.87, being the amount of taxes assessed upon said property, and due to the city of Philadelphia, for the years 1871 and 1872.

The prayer is, that the defendant be restrained, either by himself, his agent, or deputy, from further proceedings on his distress and levy against the goods of the plaintiff.

The defendant demurs to the bill, and the question which is raised by

the demurrer is as to the power of the collector of delinquent taxes to levy and sell the goods of a tenant for the taxes assessed against real estate leased and occupied by him.

The office of collector of outstanding or delinquent taxes was created by act of March 24, 1870, P. L. 544; the material provisions of which are, that the collector shall be appointed by the receiver of taxes, and hold his office for three years, and until his successor shall be duly appointed and qualified. He is required to give bonds to the city of Philadelphia, to be approved by the councils of the city, in the sum of \$30,000.

The receiver of taxes was directed to hand over to such collector the registry of all taxes due the city upon the first of February, 1871, and in each succeeding year the registry of delinquents of the previous year.

The second section of the act defines the powers of the collector.

He is to proceed immediately thereafter to collect all such delinquent taxes out of the personal or real estate of said delinquent owner, wherever the same may be found. He is invested with full and absolute authority to sell the personal or real estate of said owner, and after the first day of June of any year, may file liens for delinquent taxes, take judgment, and sell the real estate upon which the taxes were levied. The further duties and liabilities of the collector are prescribed by the third and fourth sections of the act.

There is in this act of assembly the intention clearly stated, to create a new office and provide for the appointment of an officer, charged with the collection of the unpaid taxes due, and thereafter to become due to the city of Philadelphia. By the eleventh section of the act of consolidation, similar duties had been imposed on the receiver of taxes; full power was given to collect all taxes due the city, and that he might effectually accomplish this, it was provided, that he should "have and exercise all the powers conferred by law in that behalf." These powers will be best understood by an examination of previous legislation on this subject. The acts of 1802 and 1804, 4 Smith's Laws, 203, give express authority to levy on the personal property of the tenant for taxes assessed on the real estate of the owner. These laws were followed by that of February 24, 1834, P. L. 518, which made the goods and chattels of *any person* occupying real estate on which taxes had been assessed *during his occupancy*, liable to be distrained upon for the payment of such taxes.

The material change introduced by the act was, that it did not confine the liability to a distress, to the goods of a tenant holding by lease, but made the personal property of *any one* in possession of the land, subject to be distrained upon and sold for unpaid taxes which had been assessed upon the real estate, during his occupancy of it. In the case of *McGregor vs. Montgomery*, 4 Barr, 237, it is decided, that under the act of 1834, the goods and chattels of the owner, and also of one holding by lease or otherwise, were subject to levy and sale, wherever found; provided, that when the goods levied on belonged to a tenant or occupier, they were only liable for taxes assessed upon the land during the time of his occupancy of it.

This power, by the act of consolidation, was given to the receiver of taxes by the clause, he shall "have and exercise all the powers conferred by law in that behalf." The receiver of taxes could, therefore, right-

fully exercise the authority which, it is now claimed, belongs to the collector of outstanding taxes. The act of 1834 invested him not only with the right, but imposed it upon him as a duty; but the act of March 24, 1870, under which the collector of delinquent taxes must proceed, does not contain, either in express terms, or by implication, a grant of like authority. The argument of the defendant, though ingenious, is not supported by the premises on which it is based. The officer created by authority of the act of 1870, is in no proper sense the agent or deputy of the receiver; on the contrary, it is the manifest purpose of the latter act to take from the receiver all power and control over taxes after they have become outstanding or delinquent; he is stripped of all authority which was conferred upon him by the act of 1834, over taxes which remain unpaid from and after the first day of February in each year next succeeding the year for which they are levied. An examination of the act of 1870 will show how absolute is this divorce; the security of the collector is to be given to the city of Philadelphia; if the taxes are not paid by the first day of June after they are placed in his hands for collection, he is to file liens, take judgments, and sell the real estate on which they are imposed. He is authorized to purchase the property sold by him under such judgments, and hold the same in trust for the city. He must make returns every two weeks, not to the receiver of taxes, but to the city treasurer, and monthly returns to the city councils, and further returns to the board of revision of taxes. He is made subject to indictment for misdemeanor in office, and may be punishable by fine and by removal from office.

The only feature of the act of 1870 which in any way connects the collector of outstanding taxes with the receiver of taxes is, that the receiver appoints the collector, but when that is done, the collector becomes an independent officer, the receiver has no further control over him, and if any doubt remained after that which had been stated in support of this view, such doubt is swept away by the further fact that the term of office of the collector, by the act of 1870, is made to extend beyond that of the receiver; he is appointed for three years, the receiver being elected for but two years. If he is the agent or deputy of the receiver, he holds office and performs duties under it, a year after his principal has ceased to be an official of the city, under an election, by virtue of which he appointed the collector. A new receiver being elected, he must, for one-third of his term, if the defendant's position is well taken, act for an officer by whom he was not appointed, who must be responsible for his acts if he is to be regarded as his deputy.

It was further argued that the several acts of assembly relating to the collection of taxes must be regarded as still in force, because the act of 24th March, 1870, does not expressly repeal them, and that they are not repealed by necessary implication. Admitting that it is the duty of the court to uphold all acts of assembly that are not expressly repealed or supplied, if it can be done, and that when a doubt exists the statute must have the benefit of the doubt, we do not find any difficulty in holding, that the power claimed by the collector of delinquent taxes cannot rightfully be exercised by him. The sixth section of the act of 1870 provides, that all laws inconsistent with the preceding sections of that act are repealed. All legislation that had provided for the collection of outstand-

ing taxes by any other officer or agent than that established by the act of 1870 was of necessity repealed. It could never have been intended that two or three persons should possess at the same time the power to levy and sell the same property for the same taxes. This would lead to conflict of authority and to confusion where order and system were clearly intended to be established. But if it be admitted that former legislation in this behalf still stands, it is equally clear that the decision of this question must be against the claims of the collector, for the act of 1870 does not invest him with the powers which, before the passage of that act, were exercised by other officers; he can do only that which the act creating his office empowers him to do, and no more, as he is authorized only to "levy and sell either the personal or real estate of said owner"—delinquent owners having been twice mentioned, it follows that he cannot distrain upon the goods of a tenant for taxes due by the owner of the premises.

Demurrer overruled and judgment for the plaintiff.

James Todd and Geo. S. Graham, Esqs., for plaintiff.

Christian Kneass, Esq., for defendant.

[*Leg. Int.*, Vol. 31, p. 268.]

WARWICK vs. WAH LEE & Co.

A Chinese laundry in a basement so conducted as to injure the trade of a tradesman in the next story may be such a nuisance as equity will interfere to prevent damage from.

In equity. Motion for a special injunction. Opinion delivered August 8, 1874, by

PEIRCE, J.—The plaintiff is lessee and occupant of store No. 113½ North Ninth street, for the purpose of selling root beer. The defendants are Chinese laundrymen, having their heating apparatus, and washing and ironing department in the basement, immediately under the plaintiff's store and the adjoining stores. The plaintiff avers that the heat, steam and stench, arising from the departments of the defendants, have caused a great falling off in his business, and have damaged his stock by overheating his premises and causing his soda fountain to burst and demolish itself, together with the counter and other fixtures of his store.

At the hearing the plaintiff amended his bill, averring that the odors arising from the defendants' premises had caused sickness to his employés. The plaintiff leased his store in January, 1873, and the defendants leased their apartments in April, 1874. I am satisfied from the affidavits presented in this case that the averments of the plaintiff are substantially sustained.

The restraining of nuisances, whether public or private, is a well-established branch of equity jurisdiction. In regard to private nuisances the interference of courts of equity by way of injunction is undoubtedly founded on the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law; or such as from its continuance or permanent mischief, must occasion a constantly occurring grievance, which cannot be otherwise prevented but

by an injunction. Where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property may or will ensue from the wrongful act or erection; in every such case, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of the party: Story's Equity Jurisprudence, sections 925, 926.

A brew-house, glass-house, lime-kiln, dye-house, smelting-house, tan-pit, chandler's shop, or swine sty, if set up in such inconvenient parts of the town as that they incommode the neighborhood, are common nuisances; so also steeping stinking skins in water, and laying them in the highway, are common nuisances; and in general everything that causes not only an unwholesome smell, but that renders the enjoyment of life and property uncomfortable, is a nuisance; Eden on Injunctions, 160. Knight Bruce V. C. in *Waller vs. Selfe*, 4 English Law and Equity Reps. 21, uses this language: "The first point disputed or not conceded, is the question whether, as between the defendant in his character of a person owning, using and occupying his parcel of land that has been mentioned on the one hand, and the plaintiffs in their character of owner and occupier of the house, offices and gardens occupied by the plaintiff, Mr. Pressly, on the other, Mr. Pressly is entitled to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or in other words, to have there for the ordinary purposes of breath and life an unpolluted and untainted atmosphere. And there can, I think, be no doubt in fact or law, that this question must be answered in the affirmative, meaning by untainted and unpolluted, not necessarily air fresh, free and pure, as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible with the physical wants of human existence." This was an application to restrain the defendant from erecting a brick kiln near to plaintiff's house, which had been built twenty years before.

Of course it is an important consideration in the case now before me, that the plaintiff was in the quiet enjoyment of the premises leased by him more than a year before the defendants leased the premises which they occupy. If the plaintiff had rented his store subsequently to the possession obtained by the defendants, as he would or could have known of the annoyances of which he complains, equity would be slow to relieve him of the consequences of his own folly.

Courts of equity, however, are very loth to interfere with the ordinary pursuits of mankind, and whilst I feel it my duty to continue this special injunction, I modify the form of it so that the defendants, their servants and agents, be restrained by special injunction from carrying on and conducting their business as laundrymen at the premises aforesaid, so as to occasion damage or annoyance to the plaintiff. This will permit them to conduct their business at the place occupied by them if they can so alter and change their mode of carrying it on as not to annoy and damage the plaintiff.

John C. Grady and J. Howard Gendell, Esqs., for plaintiff.

Frank A. Osbourne and J. H. Anders, Esqs., for defendants.

[Leg. Int., Vol. 31, p. 340.]

THE COMMONWEALTH *Ex relatione* JOS. S. ALLEN *vs.* WM. BUMM.

1. The office of councilman is a town office.
2. A citizen who claims a seat in councils in place of one who has removed from the ward, has sufficient interest to entitle him to a writ of *quo warranto* to determine the question of forfeiture.

Motion to quash writ of *quo warranto*. Opinion delivered October 17, 1874, by

PEIRCE, J.—This writ was sued out to test the right of the defendant to the office of member of select council of the city of Philadelphia. The suggestion sets forth that the defendant was elected a member of select council for the Eighteenth ward of the city of Philadelphia, for a term which would expire January 1, 1875, and that he moved from the Eighteenth ward, from which he had been elected, and had become a resident of the Fifteenth ward before the month of February last, whereby it became the duty of the qualified electors of the Eighteenth ward, at the next municipal election thereafter, to elect a person as a member of said council for the unexpired term of the said William Bumm. That the said relator on the third Tuesday of February last, being the next municipal election thereafter, was chosen by the qualified electors of the Eighteenth ward for the unexpired term of said defendant, and a certificate of his election had been delivered to the said relator accordingly. That the said defendant, since his removal from the Eighteenth ward as aforesaid, hath exercised, and still doth exercise, the franchises and privileges of the said office, and prayed for process against the said William Bumm to answer by what right he claims to have and enjoy the franchises and privileges of a member of the select council as aforesaid.

Upon this suggestion the writ of *quo warranto* was issued, and the defendant moved to quash it on several grounds, viz.: 1. It is not in reference to any known or recognized office. 2. The subject-matter is not within the jurisdiction of the court. 3. The suggestion is filed and the writ issued at the instance of a private relator. 4. The suggestion does not set out a case for the allowance of this writ.

The first objection has reference to a description of the office as "a member of select council for the Eighteenth ward of the city of Philadelphia."

The title of the office is "member of select council of the city of Philadelphia." The insertion of the words "for the Eighteenth ward" is amendable by striking them out. It is not a ground for quashing the writ. The reason of the second objection is that the jurisdiction of the Common Pleas in matters of public office is confined to town and township offices. The office of a member of select council is technically a municipal office, and there are offices known specifically as township offices; but is not the office of a member of select council, if not within the letter, within the meaning and spirit of the law? Richardson, in his dictionary, defines a town to be "an undefined collection of houses or habitations." Webster defines it, "any collection of houses larger than a village." In this use he says the word is very indefinite, and a town may consist of 20 houses or 20,000. He defines a city to be "in a general sense," a large town; a large number of houses and inhabitants established in one

place. In law, tithings, towns or villas are of the same signification. The word town or villa is, indeed, by the alteration of terms and language, now become a general term, comprehending under it the several species of cities, boroughs, and common towns: 1 Blackstone Commentaries, s. 4, Introduction. Several cases of *quo warranto* touching the rights of members of council have gone up from this court to the Supreme Court, but it does not appear in any case that the jurisdiction of this court in such a case has been called in question. To the contrary, in *Commonwealth vs. Cluely*, 6 P. F. Smith, 272, Judge Strong said the act gave jurisdiction to Courts of Common Pleas in municipal cases. This objection is not sustained. The third objection is that the suggestion is filed and the writ issued at the instance of a private relator. The act of assembly conferring jurisdiction on this court by *quo warranto* in cases of this character, says that the writ may be issued at the suggestion of the attorney-general or his deputy in the respective county, or any person or persons desiring to prosecute the same. In the *Commonwealth vs. Cluely*, 6 P. F. Smith, 270, and in other cases, the Supreme Court has said that the words "any person or persons desiring to prosecute the same," means any person who has an interest to be affected. This brings us to the question, "has the relator an interest in the office which he alleges the defendant unlawfully exercises?" The question for decision is not whether the relator was duly elected to the office. With that question we have nothing to do. That, by act of assembly, is made the duty of the council to determine. And the relator does not seek by the writ of *quo warranto* to have that question determined. The only object of the writ is to ascertain whether the defendant has done an act by which a forfeiture of his office has occurred. Has the relator an interest to be affected by the determination of this question? He claims to have been elected to the office now filled by the defendant, and he holds his certificate of election thereto. If the defendant unlawfully holds the office, the relator, with his certificate of election in hand, may go to the select council and ask to be admitted a member thereof. He therefore clearly has an interest to be affected by the determination of this question; for with the office declared vacant by the defendant, he has accomplished one step towards a determination of his right of admission to the office. It may be that the select council also has the right to determine the question of the forfeiture of the office by the defendant, but as was determined in *Commonwealth vs. Allen*, 29 Legal Intelligencer, 4, this does not oust the jurisdiction of this court to inquire into a question of disqualification.

The last objection is of a general character, and is embraced in the three preceding objections. It does not, therefore, require further consideration. The motion to quash is therefore refused.

David W. Sellers, Esq., for relator.

Lewis C. Cassidy, Esq., for defendant.

[Leg. Int., Vol. 31, p. 340.]

THE COMMONWEALTH *ex rel.* WM. HEACOCK *et al.* vs. HORNE.

Private citizens having no particular or special interest to be affected have not the right to ask for a *quo warranto* to oust a member of councils.

Quo warranto. Demurrer to plea to jurisdiction and motion in arrest of judgment.

Opinion delivered October 17, 1874, by

PEIRCE, J.—This writ was issued to test the right of the defendant to the office of a member of common council of the city of Philadelphia, on the ground that at the October election, 1873, the Ninth ward, from which he was elected, was not entitled to two members of common council. By act of assembly of March 1, 1864, it was enacted: "That each ward of the city of Philadelphia shall have a member of common council for each 2,000 of taxable inhabitants that it shall contain, according to the list of taxables for the preceding year." It was suggested by the relators that the Ninth ward did not contain, according to the list of taxables for the preceding year, 4,000 taxable inhabitants, and issue was joined on this fact. On trial of the cause before a jury they rendered a verdict finding that the number of taxable inhabitants for the preceding year was 3,859. If this court has jurisdiction of the case at the suit of private relators, then this verdict is decisive against the right of the defendant to the office which he holds. Another point was made, that the office of a member of common council, not being a county or township office, the court had not jurisdiction according to the terms of the act of assembly giving jurisdiction. But in the case of the *Commonwealth ex rel. Allen vs. Bumm*, decided to-day, this court held that the office of a member of council was within the meaning of the act conferring the jurisdiction. The only remaining question is, had the court jurisdiction of the question at the suit of private relators, having no particular or special interest to be affected beyond others of their fellow-citizens? In *Meeser's Case*, 8 Wright, 341, the Supreme Court sustained such a writ, but did it with some hesitation; and afterwards, in the *Commonwealth vs. Cluely*, 6 P. F. Smith, 270, it said: "This Court has construed the words 'every person or persons desiring to prosecute the same,' to mean any person who has an interest to be affected. They do not give a private relator the writ in a case of public right, involving no individual grievance. If a private relator cannot sue out a writ to enforce a forfeiture without having an interest, the statute gives him no greater right when he complains of usurpation of a county or township office. The right of the relator in each class of cases is defined by the same words." We think that the *Commonwealth vs. Cluely* rules this case. It has not been shown that the relators have an interest to be affected other or different from that which is common to their fellow-citizens. The judgment on the verdict is arrested, and we enter judgment for the defendant on the demurrer to the plea to the jurisdiction.

John J. Ridgway, Jr., and William H. Rawle, Esqs., for relators.

P. T. Ransford and Christian Kneass, Esqs., for defendants.

[Leg. Int., Vol. 31, p. 372.]

JONES vs. PARK.

The legal remedy for disturbance of a right of way is an action of trespass on the case.

In equity. Hearing on bill, pleas and answer. Opinion delivered November 14, 1874, by

PEIRCE, J.—A bill in equity is not a remedy for every grievance. The law furnishes adequate redress for many wrongs, and where this is so equity seldom interferes, except to prevent repetition of the wrong and to enforce the right established of law. The legal remedy for disturbance of a right of way is an action of trespass on the case: *Shroder vs. Brenneman*, 11 Harris, 348; *Dietrich vs. Berk*, 12 Harris, 470.

It is not necessary, therefore, to consider the questions raised by the pleas and answer in this case, further than to say, that it does not seem to us that the right of the plaintiff has been concluded by the action of ejectment brought by him in the District Court.

We will therefore retain this bill for three months to give the plaintiff an opportunity to bring his action at law if he should so desire, with leave to him, if he should establish his right at law, to amend his bill, and seek such further relief, if any, as he may need.

Bill retained.

Joseph M. Pile, Esq., for plaintiff.

C. W. Hillman and *D. C. Harrington*, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 380.]

THE CITY OF PHILADELPHIA vs. THE GERMANTOWN PASSENGER RAILWAY COMPANY.

The park commission has power to use the name of the city of Philadelphia in any proceeding at law or in equity that may be necessary to carry into effect the objects referred to in the act creating the commission.

Opinion delivered November 18, 1874, by

PAXSON, J.—This was a rule upon Wm. H. Yerkes, Esq., park solicitor, to show cause why he should not file his warrant of attorney, and was taken to raise the question, whether that officer, acting by the authority of the park commission, has a right to commence a suit in equity in the name of the city of Philadelphia.

Mr. Yerkes, by order of the park commission, filed a bill in the above entitled action, against the Germantown Passenger Railway Company, to restrain said company from "grading or interfering with that part of Girard avenue between Pennsylvania avenue and the Junction railroad, and within the limits of the park, and from constructing or maintaining a railroad therein."

The defendant corporation alleges that neither the mayor, councils, nor the city solicitor, has assented to the filing of this bill, and that without the consent of said authorities the park commission has not the right, through its solicitor, to commence this proceeding in the name of the city.

No evidence having been produced of the consent of the city authorities above referred to, we are called upon to determine the question

whether, under the law, the park commission has a right to direct suit to be brought in the name of the city of Philadelphia. As such consent has not been shown, we must assume it to have been expressly refused.

It was urged on behalf of the defendant that the city solicitor is the only person authorized to commence suit in the name of the city; that the latter cannot be made a party plaintiff in any proceeding at law or in equity without its consent.

It is undoubtedly true that the park commission, through its solicitor, has no general power of instituting legal proceedings in the name of the city. The exercise of any such general power would be an interference with the recognized duties of the city solicitor, and lead to possible conflicts between councils and the park commission. If the power exists at all, it is only in a limited sense; in such cases where it is expressly given by law or ordinance, or is necessarily implied from the nature of the powers conferred or duties imposed upon the park commission.

The park belongs to the city of Philadelphia. The title to all this magnificent domain is in the name of the city. With the exception of such portions as were generously donated, it was paid for with the money of the city. All the expenditure for its adornment, and for its government and police regulations comes from the city treasury.

The park commission has no legal entity. It has no separate corporate existence, municipal or otherwise. It can neither sue nor be sued. It does not own a dollar of money nor a rood of land. For most legal purposes it is a myth, intangible and incorporeal. Yet the law has conferred upon it important and varied powers. It is a branch of the city government, clothed with certain authority, and performing prescribed duties, and, in its limited sphere, free from the control of the other departments of the city. In the improvements of the ground and the police regulations of the park, as well as in many other matters, its authority is exclusive, subject, however, to the important provision that it has to look to city councils for the money which it expends for such purposes. This check will at all times protect the city from reckless or unauthorized expenditure.

It is unnecessary to enumerate all the powers conferred upon the commission by act of assembly and ordinance of councils. My attention has not been called to any law or ordinance authorizing in express terms the commission to sue in the name of the city. Yet that such power is to be implied from some of the legislation in regard to the park is clear. I will cite as an illustration the act of 21st of April, 1869, P. L. 1194, the first section of which is as follows:

"That it shall be lawful for the Fairmount Park commissioners, *in the name of the city of Philadelphia*, to prevent and restrain the damage or the destruction of any trees and shrubbery upon any premises within the bounds described for the Fairmount Park, by the supplements to the act creating said park," etc.

Under this act it can hardly be doubted that the park commission has full power to use the name of the city in any proceeding at law or in equity that may be necessary to carry into effect the objects referred to in said act.

There are many other powers conferred upon the commission from which a like authority is to be implied, such as the leasing of all houses

and buildings within the park limits, the licensing of such passenger railways as it may permit to lay down rails in the park, licenses for cutting ice and keeping restaurants within the park, etc. In all these and other cases the commission contracts in the name of the city. Can it be that the commission is so powerless that it cannot collect rent from a tenant to whom it has leased a house, without permission from the mayor and councils?

The legislation in regard to the office of park solicitor, as it is called, throws some light upon the question. By section 28 of the act of 14th of April, 1868, it is provided that "there shall be an additional assistant appointed by the city solicitor, whose duty it shall be, under the direction of the city solicitor, to attend to the assessment of damages, and to such other business of a legal nature, as said commissioners may require."

Under this act the legal business of the park commission was directly under the control of the city solicitor, and a special assistant was detailed to attend to it. Had the act remained in force, it is not likely any question would ever have been raised as to his authority.

The said act was repealed by the act of January 27, 1870, the fifth section of which provides that "there shall be appointed by the commissioners of Fairmount Park a solicitor, whose duty it shall be, under their direction, to attend to the assessment of damages, and to such other business of a legal nature as the said commissioners may require; he shall receive during the present year and hereafter, until otherwise ordered by councils, the same compensation as is now provided for the assistant solicitor named in the twenty-eighth section."

Under the provisions of this act it is conceded that Mr. Yerkes, the present solicitor, was duly elected by the park commission. It will be seen that he takes the place of the assistant city solicitor referred to in the act of 1868. His duties remain the same; his salary is paid by the city, and his services are rendered to and for the city, under the direction of the park commission. The only difference is that he is appointed in a different manner, and is not under the control of, or subordinate to, the city solicitor. He is called park solicitor, but this is evidently for convenience merely. He is not so designated in the act of assembly. The language of said act is: "There shall be appointed by the commissioners of Fairmount Park, a solicitor," etc. He is not solicitor for the park commission, but for the city of Philadelphia; is paid by the city, and has no duties to perform but those which pertain to the business of the city. It is true those duties are limited and confined to matters connected with Fairmount Park, but in his appropriate sphere he is as much a solicitor for the city as is Mr. Collis.

If, where a power is conferred or a duty imposed upon the park commission, it cannot invoke the aid of the courts to execute such power or perform such duty without first obtaining the permission of the mayor and councils and city solicitor, the commissioners would be practically powerless. While they are knocking at the doors of councils a passenger railway company might lay its tracks upon the finest avenue in the park, and put its cars in motion. Waste, spoil, and destruction might be perpetrated in any portion of its grounds. If the commission possesses no right to sue in the name of the city, the various powers conferred by the

Legislature and by councils would be practically nugatory. Such a construction of the rights of the commission, and of the solicitor appointed to attend to its branch of the city business, would subject the management of the park to the control of councils. That which was so carefully avoided by the Legislature we will not do by judicial construction.

The park solicitor having a power, though a limited one, to sue in the name of the city, we will not assume that in this case he has no such authority. The right to sue does not depend upon the right of the plaintiff to the relief prayed for in the bill. Such a rule would require the plaintiff to establish its right before commencing suit to test it, which involves an absurdity.

The rule referred to is discharged, and it is ordered that the motion to continue the special injunction be set down for argument upon the next equity motion day. In the meantime the injunction is continued.

[*Leg. Int.*, Vol. 31, p. 380.]

MORSE vs. WORRELL.

Plaintiffs' trade-mark was "The Rising Sun" stove polish with vignette of the sun. *Held*, that defendants would not be restrained from using the words "Rising Moon," with vignette of the moon.

Sur motion for special injunction. Opinion delivered *November 21, 1874*, by

PAXSON, J.—The rules of law governing trade-marks are now well settled. The difficulty lies in the application of those principles to the facts of a particular case. Thus it is well understood that a man may have a property in a trade-mark, and that a court of equity will interfere by injunction to prevent a piracy of such trade-mark. Yet what constitutes an infringement is a mixed question of law and fact, often difficult to determine. In such investigations we may be aided to some extent by experts. Much, however, must depend upon an actual inspection of the trade-mark, and of the alleged imitation.

The plaintiffs claim to be the manufacturers of an article known as "The Rising Sun Stove Polish." It is put up in packages of the form known as parallelopipedons, about four inches in length by an inch and a quarter in diameter, and covered with a wrapper of red paper, upon which is printed certain letters, and a device of a rising sun, which, it is claimed, constitutes the plaintiffs' trade-mark. When this wrapper is folded, so as to enclose one of the blocks of stove polish, it presents upon one side thereof a device evidently intended to resemble the sun rising over or beyond two hills, the one on the right lying in deep shadow; the one on the left lighter, but shaded, while the sun is a semi-circle, surrounded by wide divergent rays, printed in black on the plain color of the paper. Over this device are the words "The Rising Sun," printed in bold letters upon a curved line, and surrounded by scroll work. Under the device are the words "Stove Polish," also in a curved line, and a small portion of which only is visible upon this side of the block.

The other three sides are covered with printed matter, in smaller type, of various sizes, descriptive of the article, laudatory of its many virtues, with cautions against imitations, a statement of the price, and directions for its use. Then follows, upon the fourth side of the block, the name of

the manufacturers, "Morse Bros., Sole Proprietors, Canton, Mass.," also the words, "Entered according to Act of Congress, in the year 1870, by Morse Bros., in the office of the Librarian of Congress, at Washington," followed by the words, "A patent granted us for the words 'sun' as applied to prepared plumbago by United States, October 20, 1872, with or without prefix or affix, and any violation or infringements of any of the copyrights or trade-marks we shall immediately prosecute to the extent of the law." It is proper to say, in this connection, that the words, "this trade-mark patented," are printed in dim letters immediately under the vignette of the rising sun.

The plaintiffs produced a certificate from the United States Patent Office, showing that their trade-mark has been registered under the act of Congress. In said certificate the following appears as the plaintiffs' description of their said trade-mark :

"This trade-mark is composed of the word 'Sun,' either preceded by or not an adjective, such as the word 'Rising,' as shown in the drawing, or 'Morning,' 'Evening,' 'Setting,' 'Shining,' or 'Radiant,' or other adjective, to qualify or express the quality of, or some circumstance respecting the sun. This word 'Sun,' when thus used in connection with prepared plumbago or black lead, is to be either stamped upon each separate cake, bar or stick of the plumbago, or by printing or stamping indicated upon the box or case containing it, or upon a wrapper or label to be used with the same; it being best, as well as so intended, to add to the same a word or words sufficient to designate the purpose for which the prepared plumbago or black lead is to be used—as, for instance, 'Stove Polish,' 'Lumber Pencil,' 'Lubricator,' etc.

"In the said illustration of my trade-mark there is also a design showing a sun as rising from and beyond hills: the words 'The Rising Sun,' and the words 'Stove Polish,' being placed respectively above and below the said design, and relieved by scroll lines.

"It is not intended to limit this trade-mark to the design hereinbefore described and shown, as said design is, in many instances, not employed, and when employed, is for effect, taste and appearance, the trade-mark consisting in the adaptation of the word 'sun' to prepared plumbago or black lead."

The defendant's preparation of plumbago is put up in packages of the same size and shape as those of the plaintiffs, and covered with wrappers of a similar color. On one side of the parallelopipedon there is a vignette of a moon rising out of the ocean, or a large sheet of water. Immediately over the moon are the words "Rising Moon," printed on a curved line; to the left, and on a line with the moon, is the word "Stove," and on the right the word "Polish." On the second and third sides are directions for use, etc., and on the fourth side the words "Manufactured of Pure Carburet of Iron, at the Eagle Black Lead Works, Nos. 244, 246 and 248 North Front street, Philadelphia," and in smaller type at the bottom the additional words, "Entered according to act of Congress, in the year 1871, by Howard Worrell, in the office of the Librarian of Congress, at Washington."

Over seventy-four affidavits were submitted on behalf of the plaintiffs by persons claiming to be experts and dealers in almost every State of the Union, alleging that the plaintiffs' article was widely known to the

trade and has a large sale. Most of the affidavits say that, in their judgment, the label of the defendant was an imitation of the plaintiffs' trade-mark, and calculated to deceive purchasers; that in some instances parties had actually been misled.

On the other hand, the affidavits submitted on behalf of the defendant, though far less numerous, are equally strong, and allege that there is no imitation, and that the difference between the two labels is so radical that no person of ordinary intelligence could be deceived, or mistake the "Rising Sun" for the "Rising Moon Stove Polish."

In determining a question of this kind some regard must be had to the character of the article, its price, and the average intelligence of the persons who are likely to be its chief purchasers and consumers. When an article is costly, is used principally by persons above the ordinary standard of intelligence, and is likely to be inspected closely, the danger of deception would necessarily be less than in the case of an article of stove polish, sold at retail for ten cents, and used chiefly by the humbler and more ignorant classes.

The large number of affidavits submitted in this case has led me to consider the weight that ought to be attached to the opinions of persons professing to be experts. The conclusion to which I have arrived is, that while we will regard such affidavits so far as they aid us, and throw light upon the case, the court must at last exercise its independent judgment upon actual inspection of the trade-mark and its alleged imitation. As before observed, this is a mixed question of law and fact. Many of the professed experts may have but crude notions of what in law constitutes a trade-mark, or its violation. It does not follow as a matter of law that because one label resembles another in many respects it is necessarily such an imitation as a court of equity would declare an infringement of a trade-mark.

A careful examination of the two articles in question certainly discloses a strong general resemblance. Placed side by side upon the shelf of a country store, and viewed at some little distance, the similarity is striking. But when we come to analyze this general resemblance, it will be found to consist mainly of the color of the wrapper and the shape and size of the article. It is almost needless to say that the plaintiffs cannot have a trade-mark in red paper or parallelopipedons. I do not mean to say that even the color of the paper and the shape and size of the package are not to be considered in any case in settling the question of the imitation of a trade-mark. When there is an imitation with only colorable differences, the fact of the use of a similar wrapper, and the same size and shape for the article itself, may add great strength to the charge of an intent to deceive. But of themselves they are not enough to constitute an infringement.

Leaving out these two points of resemblance, what else is there? It is not pretended that upon the second, third and fourth sides of the parallelopipedon there is any imitation. They are distinctly and radically different. Both the style and the matter of the printing are dissimilar. If there is any infringement at all, it must be upon the first side, containing the vignette.

We will consider first the lettering. The words "Stove Polish" are clearly no part of the trade-mark. They constitute the name by which

the article is known to commerce. It is a principle too well settled to need the citation of authorities, that no one can appropriate as a trade-mark the commercial name of any article known to trade. Nor do the plaintiffs claim a trade-mark in the word "Rising," except in its application to the word "Sun," and that is not used by the defendant in his label. He uses the word "Moon," which is of entirely different sound and signification.

The real point in the case is the vignette. The plaintiffs allege that the defendant's moon is an imitation of their sun. Yet the defendant's device resembles the moon quite as much as the plaintiffs' device resembles the sun. Neither is executed in the highest style of art. There is, however, a marked difference between them, and when it is considered that the one is appropriately labeled a moon, and the other is appropriately labeled a sun, there ought not to be any serious difficulty in distinguishing the one from the other. The embarrassment of this branch of the plaintiffs' case consists in the fact that they have taken for a device one of the heavenly bodies which in shape closely resembles another of the heavenly bodies. They may, perhaps, be entitled to use the "Sun" as a device or symbol for their trade-mark, but it does not follow that they may in the same manner appropriate the entire planetary system, with its attendant moons, rings and comets.

It is unnecessary to refer at length to the plaintiffs' description of their trade-mark filed in the Patent Office. It may be that they are not absolutely restricted in this proceeding to the claim there made, as it is not instituted under the act of Congress authorizing the registration of trade-marks, and providing penalties for its violation. We are not called upon to decide this question, as the claim now made does not vary materially from what is claimed in the description filed in the Patent Office. The latter is certainly evidence, as being the statement of the plaintiffs themselves as to what they consider their trade-mark.

Nor do I attach any importance to the use of the word "patented" upon the plaintiffs' label. It must be borne in mind that it is the trade-mark, not the manufactured article, that they claim to be patented. It is well known that a trade-mark cannot be patented. But it may be registered in the Patent Office, and a certificate granted therefor, which was done in this case, and was probably what the plaintiffs really meant when they stamped their label with the words "This trade-mark patented." When a manufactured article is stamped as "patented," when in point of fact no patent has been obtained for it, the law regards such a transaction as deceptive, and a court of equity would refuse to enjoin for an infringement of a trade-mark for this reason alone.

The plaintiffs' device of a sun rising over and beyond hills is almost a fac-simile of the one at the head of the editorial columns of the *New York Daily Sun*. It does not appear in this proceeding who is entitled to the credit of originating it, nor is it, perhaps, material.

I have referred to the points of difference between the trade-marks of the plaintiffs and the alleged imitation for the purpose of showing that the case as now presented is not clear enough to justify the court in interfering by a preliminary injunction. This is the extent of our present decision. It is quite possible that the general resemblance between the two labels before alluded to is not the result of accident. There may be

a case in which differences are designedly introduced, yet such a combination produced with the aid of the color of the wrapper and size and shape of the article as to amount to an infringement. In such cases the line of distinction between the genuine and the simulated trade-mark is a very nice one. The defendant's label, in my judgment, lies very close upon the border. We will determine upon which side of the line it is after the plaintiffs shall have established their right at law, or upon final hearing.

The injunction is refused.

W. W. Montgomery, Samuel Wagner, Jr., Esqs., and Hon. F. Carroll Brewster, for complainants.

Victor Guillon, Esq., for defendant.

[Leg. Int., Vol. 31, p. 388.]

NEILL vs. GALLAGHER.

1. All the houses in a certain row were, less than twenty years ago, built five feet back from the building line, but there was no express agreement among the property-owners to this effect. *Held*, that a special injunction would not be granted to prevent defendant from erecting a bay window on the five feet recess.
2. The mere setting back of a building from the line of a street by the owner for his own convenience or comfort, is not of itself a dedication of the land thrown out, and he may reclaim it at will.

Opinion delivered November 18, 1874, by

PAXSON, J.—The defendant is the owner of the house No. 1823 Wallace street, and is about throwing out a bay or oriel window from the first floor of the front of said house. The foundations for said window are already laid. It is proposed to extend it to the top of the first story in height, and to project it about five feet beyond the front of the house.

The plaintiff is the owner of the adjoining house, No. 1825 Wallace street, and alleges that the defendant's proposed window will injure his property by obstructing the view from plaintiff's windows, and interfering with his enjoyment of light and air. He further alleges that the said window, if constructed according to the plans, and foundations as laid, will project several feet over the recognized building line of said street, and to prevent this he asks us to enjoin the defendant.

The defendant has answered the bill, denying all of its equities. He says the proposed window will not project beyond the building line. In this he is sustained by the affidavit of the district surveyor. Upon this hearing we treat the answer of the defendant as an affidavit.

It is an undisputed fact that the recorded building line of Wallace street is outside of the proposed window. It is also conceded that all of the houses on the north side of Wallace street, between Eighteenth and Nineteenth, recede five feet from the recorded line. The house now owned by the defendant was the first one erected on this square, and was built less than twenty years ago. The person who was owner at that time, without any agreement with any one, so far as appears in this case, receded five feet, and enclosed the ground thus thrown out, with an iron railing, forming a small yard in front of his house. All of the other owners of property in this square, who subsequently erected buildings

thereon, likewise receded five feet until the entire square was built up on the same line.

In the absence of any express agreement between the property-owners to fall back, we are asked to infer an implied agreement to recede, from the fact of their having receded; and the plaintiff alleges that it would now be inequitable for one owner to violate this implied agreement, and project any portion of his house over the five feet. In other words, that by setting his house back there was a dedication of the five feet to public use.

The mere setting back of a building from the line of a street by the owner, for his own convenience or comfort, is not of itself a dedication of the land thrown out, and he may reclaim it at will: *Biddle vs. Ash*, 2 Ashmead, 211; *Gowen vs. The Exchange Company*, 5 W. & S. 141. There would be even less reason to infer such dedication where, as here, the owner fenced in the land thrown out, and used it as a garden or grass plat. This case, however, differs from those above cited in this, that all the property-owners have receded to the same line, thus practically widening the street between Eighteenth and Nineteenth streets.

This brief statement of the case is sufficient to show that the question is an important one. Upon the facts as presented, it is also a doubtful one. It is too uncertain to be determined upon a motion for a special injunction. It may be that upon final hearing the plaintiff will be able to establish the present, actual line of the houses, as the true building line of the street. The most that he can claim upon this hearing is to have raised a doubt as to the line.

The rule is well settled that an injunction should not be granted in a doubtful case. Of the wisdom of the rule there can be no question. Were we to continue this injunction we should stop the completion of the defendant's improvements, upon the eve of winter, after his plans have been matured, and the work under way. We should not hesitate to do this if the plaintiff's rights were clear, or had been established at law. But to do so in a case of doubt, would be an improper exercise of the equity powers of the court.

Nor is the injury to the plaintiff of that irreparable kind which imposes upon a chancellor the necessity of prompt action. It may be an annoyance to have a bay window thrown out from the front of an adjoining house; it may obstruct the view in one direction, and to a trifling extent the light. But the plaintiff's windows are not ancient, and if they were, it would not matter, as the doctrine of ancient lights, as applied to large cities, no longer prevails in Pennsylvania: *Haverstick vs. Sipe*, 9 C., page 368; 6 Id. page 296. It is true it is alleged that the proposed window would seriously impair the value of the plaintiff's property, one witness estimating the depreciation at from \$2,500 to \$3,000. But the mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish sufficient ground for equitable relief: *Sutcliff vs. Isaacs*, 1 Pars. E. C. 494; *Winstanley vs. Lee*, 2 Swanst. 336; 16 Vesey, 342.

If, upon final hearing, the right of the plaintiff is established, the defendant's window must come down. The respective properties would then stand precisely as they do now. Irreparable injuries are such as are not only not capable of adequate compensation in damages, but

those also, which are of a character to make a restoration to the former status of things practically impossible.

The motion to continue the special injunction heretofore granted in this case is denied.

George H. McCabe, Esq., for plaintiff.

H. S. Hagert, Esq., for defendant.

[Leg. Int., Vol. 31, p. 396.]

TOONE vs. TOONE.

An amendment to a libel in divorce will be allowed even after it has been referred to an examiner, if he has not entered upon the performance of his duties, and no hardship would be imposed upon the respondent by the amendment.

Opinion delivered *December 5, 1874*, by

PAXSON, J.—This was a rule to show cause why the libellant should not be allowed to amend her libel. The rule was resisted by the learned counsel for the respondent, upon the ground that the proposed amendment contained a new and distinct ground of divorce, substantially changing the cause of action.

The various acts of assembly relating to amendments are very liberal. They cover not only mistakes in the forms of pleading, but also in the names of parties, plaintiffs and defendants; and by a recent act (10th of May, 1871) even the form of action may be changed in any stage of the proceedings, upon the payment of all costs up to the time of amendment.

The acts of assembly alluded to, apply only to common law actions. They have no reference to proceedings in equity. It is true the act of 4th May, 1864, provides that, "In all proceedings in equity, according to equity forms, the several District Courts and Courts of Common Pleas in this Commonwealth, may permit, at their discretion, and when in their opinion the same will affect the merits of the matter in controversy, and expedite justice, amendments to be made in bills, answers, pleas, or other matters, in the same manner as now obtains in common law cases and practice," etc.

This act was not needed to enable courts of equity to amend equity proceedings. It conferred no new or additional authority. It required the aid of the Legislature to enable the courts to amend proceedings at law, but equity forms have always been of a peculiarly plastic nature, and easily moulded to meet the exigencies of a particular case.

A libel in divorce, although not technically a bill in equity, may be said to be of the nature of a proceeding in equity. While it is a statutory remedy, and conducted according to statutory forms, those forms bear a close analogy to the forms in equity. Amendments in such cases are not of right, but rest in the sound discretion of the court. That discretion is controlled to some extent by the same considerations that would move a chancellor in ordinary equity proceedings; and by analogy, by the acts of assembly in reference to amendments at law.

In this case, the motion to amend was made after it had been referred to an examiner, and before he had entered upon the performance of his duties. No testimony had been taken, and no hardship would be im-

posed upon the respondent by the amendment. The court might well refuse such a motion where it is made to appear that the object is to vex or oppress the opposite party.

Nor is the objection that an additional cause of divorce is introduced, a valid one. The libellant is not necessarily restricted to one ground of divorce. She might have alleged both causes in her original libel, and there is no good reason why she may not amend now so as to include both.

At the close of the proposed amendment, the libellant has introduced an allegation of a disgusting character, which, if true, is a matter of evidence and not of pleading. Purged of the offensive paragraph, the amendment may be filed.

Rule absolute.

John Roberts, Esq., for the libellant.

J. Cooke Longstreth, Esq., for the respondent.

Quarter Sessions, Philadelphia.

[Leg. Int., Vol. 30, p. 45.]

CITY vs. WILLIAMSON.

1. A marriage, although it may be void by the law of England, is not absolutely void here.
2. Defendant when he was married representing himself to be a Catholic, will not be allowed to contradict it now and ask to have the marriage declared void.

Opinion delivered *February 1, 1873*, by

LUDLOW, J.—This case presents a number of questions, all of them interesting, and in view of the facts proved, somewhat novel.

The real plaintiff here is a woman who alleges that she married the defendant, lived with him as his wife for sixteen years, and was the mother by him of seven children; all are now dead except two, and one of the survivors appears with his mother in court. The defendant does not deny that he went through the ceremony of marriage with this woman, and that the ceremony was performed by a Catholic priest, in a private room at Antrim, in Ireland, at or near the place of the then residence of the parties; the cohabitation and birth of children during a period of sixteen years is admitted, but the defendant declares he is, and always has been a Protestant, and interposes as a flat bar to this motion, an English statute passed in the nineteenth year of the reign of George II., which declares, chap. 13, section 1: "That every marriage that shall be celebrated after the 1st day of May, 1746, between a Papist and any person who hath been or hath professed him or herself to be a Protestant, at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void, to all intents and purposes, without any process, judgment, or sentence of law whatsoever."

As a consequence, it has been argued that the children of these parties are bastards, and their mother nothing more than a concubine.

With these facts before us, and these consequences likely to flow from a decision in favor of the defendant, we are more anxious to give to him the amplest opportunity to sustain his case; to do so, however, he must very clearly establish the existence of the law, and of the facts necessary to bring his case within its provisions, and we must be certain that the case is one which does not fall within the class of exceptions recognized by all jurists; and moreover, that to enforce a general principle, will not be to destroy that policy of our own government, which will not tolerate the enforcement of a law born in bigotry and intolerance, and which will carry havoc and ruin into many a virtuous household. The general principle undoubtedly is, that between persons, *sui juris*, marriage is to be decided by the laws of the place where it is celebrated; if valid or void there, it is valid or void everywhere; but Judge Rogers, in delivering the opinion of the court in *Phillips vs. Gregg*, 10 Watts, 168, most righteously observes, that our courts have not established,

e converso, that marriages of citizens not good according to the place where celebrated, are universally and under all possible circumstances to be disregarded." Well-known and universally recognized exceptions to the general rule exist, as in cases involving polygamy or incest, for, says Chancellor Kent, no Christian country will recognize such marriages: 2 Kent, 91, n.

Story, in his *Conflict of Laws*, p. 85, 87, 91 and 92, in substance maintained, that whenever the laws of a foreign country are in violation of the laws of God, sound principles of morals, or settled principles of public policy, they will not be recognized.

Bishop, in his work upon *Marriage and Divorce*, p. 130, also refers to cases which must of necessity be exceptional. Indeed, the whole doctrine of the law upon this important subject, while it recognizes the law of marriage as a part of the *jus gentium*, as distinctly enforces the idea that in the application of the law, the courts having jurisdiction of a particular case, must be governed by the facts of that case, and by its opinion of the applicability of the general principle to the particular cause.

It is not absolutely necessary now for us to dispose of this motion upon a question of law alone. Granting that the English statute is now in force, and has been properly proved, if it could be disposed of upon no other ground, I incline most strongly to the opinion that, in so far as it is now sought to destroy this marriage, the effort must be abortive, for upon grounds of public policy an American court cannot recognize the legal effect of this English statute.

The words public policy may have an unlimited meaning, and therefore, we pause here to specify some of the reasons which induce us to use that language.

Marriage is universally regarded as the foundation stone of all the social relations. Without its existence the social fabric falls into ruins. The presumption of law is always in its favor, and he who contests its validity has the burden of proof thrown upon himself.

A religious test is of all things most objectionable to an American legislator or jurist, and a law which would bastardize issue, and destroy civil rights, upon the basis of a difference of opinion in religion, could not be tolerated in the United States. The government is one of universal toleration, and its policy has been, and is, to invite to its hospitable shores, the inhabitants of all the earth. Foreign governments to execute their own schemes may, indeed, render impossible, marriages between different classes of their own subjects; but unless we are prepared to give effect to laws, the relic of other days, days of bigotry and rank intolerance, and of a policy as short sighted as it was cruel, we will declare that universal toleration, hospitality, and protection, shall not only be proclaimed, but shall also be enforced.

We shall not be told that a husband and father may come into this jurisdiction, make it his domicile, and then when followed by his wife and children, shall deliberately turn them all out upon the cold charity of the world, proclaiming that every right has been destroyed by virtue of an antiquated statute. Seizing the principle that exceptions do exist to the general rule of law upon the subject of foreign marriages, sustained and fortified upon this point by the opinions of text-writers, jurists, and publicists the most eminent, we are not to be deterred from the

expression of an opinion by any supposed international law, which would countenance as binding upon us an English statute, which, if it does not belong to the class which includes bigamy and polygamy, certainly deserves to be ranked among those laws, enacted by another sovereignty, which tend to debase public morals, and to introduce a test utterly at war with a fundamental principle of American government. If this nation, in the strength of its manhood, is to be respected; if it has achieved the right to speak and to be heard, its policy upon this subject ought to be marked and understood; and it surely will entitle itself to the grateful consideration of the civilized world, if it emphatically declares that upon the subject of marriage, and especially its destruction, it will determine every case by its own enlightened principles of morals and of public policy, and in such a cause as this, upon the policy of universal toleration.

There is another view to be taken of this cause: The English statute has not been proved according to law. It may be in force, but we are not absolutely certain that it has not been qualified, become obsolete, or been repealed; and therefore we are not bound to regard its provisions. Assume, however, that it is in force, how stands the cause upon the evidence?

Mrs. Williamson details the circumstances of courtship and marriage. Her testimony as to cohabitation and reputation of marriage is corroborated by several other witnesses.

Upon the question of the religious faith of her intended husband, we do not agree with the view taken of the evidence by defendant's counsel. We think Mrs. Williamson declares that she told him she would never marry a Protestant; that he wrote a letter to the priest, which he showed to the plaintiff, informing him that he was a Catholic; that he so informed his intended wife before marriage, adding that he had for a long time been a Catholic.

He was married by a Catholic priest. His children were baptized by a Catholic priest in his own house and presence. The defendant admitted, on the hearing, that he took his son James in a carriage to the Catholic chapel to be confirmed by the bishop. To the important and essential points in this testimony the defendant interposes an absolute denial, but he stands alone, and as to collateral matters, he was contradicted in several particulars.

If a doubt existed as to his religious faith, that doubt would settle the case in favor of the wife, for as the presumptions of law are in favor of rather than against marriage, it cannot be destroyed by doubtful testimony.

We, however, go further than this, for upon the evidence we have no doubt that Williamson did represent himself to be a Catholic, and had done so for a long time before the celebration of the marriage.

In *Yelverton vs. Yelverton*, 4 McQueen's H. of L. Cases, p. 862, Lord Wensleydale said: "The appellant having been born a Protestant, must be deemed to have continued so, unless he has done something to denote a change in his religious persuasion—and nothing of that kind appears."

And again: "Had he said he was a Roman Catholic, it would have raised the question, reported to have been decided by Baron Alderson,

in *Regina vs. Owell*, whether he was estopped by his declaration, that he was a Roman Catholic."

The evidence here, as we have already stated, seems to be at best in a doubtful condition upon one point, but the weight of it seems to establish the fact, that this defendant considered himself a good enough Catholic to contract this marriage, to live for sixteen years unmolested by any legal authority, to become the father of seven children by this wife. Nor did the defendant discover how thorough a Protestant he was, until it became convenient to abandon his wife, establish a domicile here, and contract another marriage with another woman in this country.

It gives me great judicial satisfaction, to be enabled, upon the facts before me, to render a decision in favor of this wife—to make this faithless husband and father, who did not hesitate in fact to brand his own offspring in an open court of justice as a bastard, to understand that justice is administered here, and that his conduct does not fail in the most unequivocal manner to meet with the sternest, most uncompromising judicial condemnation.

Let an order be prepared directing the defendant to pay for the support of his wife \$6 per week, and let a bond in the usual form be also prepared in the sum of \$700, conditioned for the faithful performance of this order.

Daniel Dougherty, Esq., for wife.

Joseph T. Ford and Joseph A. Bonham, Esqs., for respondent.

[Leg. Int., Vol. 30, p. 92.]

CITY vs. WILLIAMSON.

Property in the possession of the wife will be presumed to be the property of her husband. The claimant who had falsely claimed to be the wife of defendant held to this rule.

Opinion delivered *March 15, 1873*, by

PAXSON, J.—This case was heard before my brother Ludlow a few weeks since, and resulted in an order upon the defendant to pay \$6 per week for the support of his wife, and that he enter security in the usual form to comply with said order. Instead of doing so the defendant fled our jurisdiction, and is now in contempt. The guardians of the poor then issued a warrant of seizure under the act of assembly, under which the house and furniture of the defendant were levied upon.

On Saturday last, a motion was made on behalf of the defendant to quash the warrant. This motion was overruled by the court, upon the ground that the defendant was in contempt, and not entitled to be heard. The motion to quash was thereupon renewed on behalf of Mary McNicholls, who claims to be the garnishee. This motion was also overruled. An affidavit was then filed by Mary Williamson, alleging that the property seized under the warrant belonged to her, and not to the defendant. Mary McNicholls and Mary Williamson are one and the same person. This woman formerly lived with defendant and his wife in Ireland, and was the cause of their domestic troubles. Subsequently she came to this country. The faithless husband and father

deserted his wife and children, followed Mary McNicholls to this city, and married her. The whole of these proceedings were reviewed by my brother Ludlow, in his very able opinion, which it is proper to say was fully concurred in by all the members of the court. We unite our condemnation to his of the conduct of this defendant. The affidavit filed does not aver the marriage of the affiant with defendant. The learned counsel, however, claimed upon the argument that she was his wife. For the purposes of this case we will hold her to all the consequences of the relation which is claimed for her. One of these consequences is, that the property in her possession is presumed to be the property of her husband. The onus is upon her to show that it is her separate estate, and how and from whom she acquired it. This she has not done. The affidavit is a mere assertion that the property is her separate estate, but it contains nothing to negative the presumption of law that the money to purchase it was supplied by her husband. This renders it unnecessary for us to decide what would be the proper practice when a disputed question of fact is raised as to the ownership of property seized under a warrant of this description.

The warrant of seizure is confirmed.

[Leg. Int., Vol. 30, p. 100.]

COMMONWEALTH vs. POWELL.

The neglect of the proprietor of a theatre to mark a seat "taken," can give a stranger no right to a seat which had already been purchased by a third party.

Motion for new trial. Opinion delivered *March 22, 1873*, by

PAXSON, J.—This case raises an interesting question touching the rights of persons visiting places of amusement. The defendant is a special officer at Wood's museum. On the evening of last Thanksgiving day the prosecutor, George Keen, purchased a ticket of admission to said museum; he entered and took his seat in that portion of the building for which the ticket had been sold. At that time there were few persons in the house, and the ushers were commencing to mark the seats as "taken." The one selected by the prosecutor had not been so marked; but immediately upon his taking it he was informed by the defendant that the said seat had been sold, and requested at the same time to occupy another and equally eligible one in the vicinity. This the prosecutor refused to do; whereupon the defendant forcibly removed him. For doing so the defendant was prosecuted and convicted of an assault and battery.

A visitor at a theatre or other place of amusement is entitled to a seat. This right to some extent depends upon the character of his ticket. If for a reserved seat, he has a right to that particular seat. If not reserved, then to any one he may find unoccupied, and which had not previously been sold to another. I instructed the jury that if the prosecutor selected a seat in that portion of the building called for by his ticket, and that there was nothing upon the said seat to indicate that it was "taken," and no notice had in fact been given prosecutor prior thereto that it had been sold to some one else, he had a right to occupy it, and the act of the defendant in ejecting him therefrom was an assault

and battery. Subsequent reflection has satisfied me that it is not so much a question of notice, as of whether there had been an actual *bona fide* sale of that particular seat to a third party. If so, no neglect on the part of the proprietor of the museum in marking said seat as "taken" could give the prosecutor a right to that which some one else had previously bought and paid for. It will be seen that my instructions were too broad. The jury may have been misled. For this reason the defendant must have a new trial. Next to being right, nothing affords me so much pleasure as to correct a mistake.

The rule to show cause why a new trial should not be granted is allowed, and the same rule is now made absolute.

[Leg. Int., Vol. 30, p. 153.]

DUHRING'S APPEAL

1. When a plan has been sent back, after a hearing, to the board of surveyors for reconsideration, and the board having reconsidered it, and by resolution confirmed it again, this is not a final judgment, but a person interested may take an appeal to the Quarter Sessions.
2. The presumption is that the plan of the board is a proper one, and the court ought to be satisfied of clear mistake or abuse of power before they will reverse it.

In the matter of revision of plan of Ridge avenue from Thirty-third street to Laurel Hill Cemetery.

Appeal of C. H. Duhring, from the plan adopted by the board of surveys, widening Ridge avenue.

Opinion delivered May 2, 1873, by

ALLISON, P. J.—Ridge avenue as originally laid out, is sixty feet in width, with thirty-four feet of roadway, and sidewalks of thirteen feet on each side.

In July, 1872, city councils, by resolution, directed the department of surveys, to prepare plans for the widening of Ridge avenue to one hundred feet, from Thirty-third street to Laurel Hill Cemetery, revising lines and grades of contiguous streets. A plan was adopted by the board widening the avenue twenty feet on each side of the former alignment of the road or avenue; to this plan Mr. C. H. Duhring objected, for the reason that it would do great injury to the property of the estate of Henry Duhring, deceased, taking ground over nine hundred feet in length by twenty feet in width from the frontage on the avenue, subjecting them to loss and the city to heavy damages. He contends that it would be better to take all of the forty feet from ground on the west side of the avenue, and urges in support of this position, that the park commissioners have, by resolution of their board, voted to widen the avenue at this point forty feet, on the park side, from Thirty-third street to the cemetery, thus anticipating the action of the councils of the city, who, by the act of April 14, 1868, are directed to lay out an avenue not less than one hundred feet in width, as one of the streets of the city, as a boundary of the park, upon the eastern side of the river, from the intersection of Pennsylvania avenue and Thirty-third street, northward along the boundary of the park to the Schuylkill river.

It is admitted that this action on the part of the park commissioners

is not binding on the city, and that councils have not accepted or approved of it, and that as it now stands, they cannot be compelled to regard this strip proposed to be taken from the park, of forty feet wide, as a part of the avenue to be widened to one hundred feet. The plan of the board of surveys contemplates taking but one-half, or twenty feet of it.

The appeal of Mr. Duhring was brought into court, but without hearing, by agreement, and at the request of parties, was sent back or allowed to be taken back to the board for re-examination. There was no hearing on the merits, and therefore no case before the court, upon which they could make a decree, confirming the plan as submitted "after a hearing," or remand it back to the board of surveyors for reconsideration and revision.

The point made by the city solicitor, against the authority or jurisdiction of the court, to hear the case, as it now stands, does not fairly arise, but if the plan had been sent back *after a hearing* by the court, for reconsideration and revision, is the point well taken, that the board having reconsidered the plan, and by resolution voted, that it should be confirmed as reported, "therefore, that the board of surveyors adhere to their action of October 21, 1872," a final judgment upon the plan, or may a person interested appeal from such a judgment to the Court of Quarter Sessions?

On a former occasion, the question of the right of appeal under the second and third sections of the act of June 6, 1871, P. L. 1353, was considered and decided in favor of the right. The difficulty grew out of the contradictory language contained in these sections, the second section saying, the confirmation of the board should be final and conclusive, and without appeal; which was immediately followed in the next section by the declaration that an appeal may be taken to the Court of Quarter Sessions within three months after the board of surveyors shall have *finally* confirmed any plan as aforesaid. The last clause was regarded upon the subject of an appeal, as a repealing clause, as to that which had preceded it; the two could not stand together; both related to the same subject-matter; plans of surveys and regulations is the term first employed, and the appeal is next given from any plan as aforesaid, finally confirmed by the board of surveyors. It is clear to our mind, that the appeal is of right, within three months after confirmation by the board. Their confirmation is final, unless before the expiration of three months the appeal is taken.

What further interpretation is to be given to this clause, which enables a party to remove his case into the Quarter Sessions for hearing? As already stated, the claim is made, that after the court has given to the question a hearing, and they do not confirm, they are to remand it back generally, for reconsideration and revision, and that there all power of the court terminates. If this is so, then the appeal is a mere shadow; it is not of the slightest value to the citizen, that he may bring his case before a superior tribunal, with such limited power of correction as this would imply. To send a plan back without instructions, as to change or alteration, will be, in most cases, to have a vote of the board, such as was given upon this plan, namely, the board adheres to its former action; just this, and nothing more. We think this is contrary to reason, and

contrary to the spirit of the act. It is certainly contrary to the system of confirmation of plans, so far back that the memory of man runs not to the contrary. It is evident, that in the attempt to make a radical change in a practice so conservative in its effect, and of such great value to the citizen, the Legislature paused, went back upon that which had been unadvisedly done, and in effect declared, that the appeal should remain as heretofore. We cannot agree that the appeal should only have value in it so far as to confirm the order of the board of surveyors, and be wholly without saving virtue if the court disagreed with them, and decided that the right was with the appellant. An appeal, therefore, carries with it the right to send a plan, as had always been done, back with instructions; or to return it to the board, generally with a right of appeal from each decision or judgment of the surveyors. When sent to the surveyors with instructions, the right to enforce obedience by mandamus follows. The language of the act will fully bear out the construction we place upon it. A reconsideration means not only a review of the mind, a second consideration, but an annulment; a revision; and to revise is to alter and amend, as well as to review and re-examine; so that when a plan is returned to the board to reconsider and revise the same, it implies, that the court may order in what particulars they shall annul and rescind, as well as alter and amend the plan; in this consists the principal value of an appeal, without it there is no control of the board of surveyors, and to send the plan back to them to revise and reconsider at their discretion, would carry with it an advisory right only. We do not construe the law as implying no more than this, but on the contrary, that upon appeal, that which had been done in time past, might continue to be done in the future, and the confirmation of the plan as adopted by the surveyors, or its alteration, is within the power of the court.

To this we desire to add, that at all times a respectful consideration should be given to the action of the board; the presumption is, that their plan is a proper plan, and in every case the court ought to be fully satisfied of clear mistake or abuse of power, before reversing the action of the surveyors, who, by education and experience, are, of all others, specially qualified to best perform the often embarrassing and difficult duties of their office.

Upon the plan which is the subject of the present controversy, we have only to say, that it has not been shown beyond a fair question, that it ought to be changed. The widening of the avenue requires that there shall be an offset in the street, and the board have decided, that it is best that it should recede twenty feet on each side of the road, and in the statement of Mr. President Smedley, one fact is made to appear, which, we think, ought to be conclusive upon the question: that is, that if the avenue is widened, taking the entire forty feet from the west side, the eastern line being continued as now established, will require on the one hundred feet avenue, footways of twenty feet in width, which would extend the footway on the eastern side seven feet into the roadway, beyond those now constructed below Thirty-third street; this would not only be a serious blur in the plan, but a more serious inconvenience to the public traversing the roadway of the avenue.

The question of damages Mr. Duhring can have presented to a jury for their determination.

The exceptions are dismissed, and the plan as adopted by the board of surveyors is confirmed.

R. Rundle Smith and *David W. Sellers, Esqs.*, for the exceptant.
R. N. Willson, Esq., contra.

[Leg. Int., Vol. 30, p. 160.]

COMMONWEALTH *vs.* TAYLOR.

Where the judge mistook the evidence in his charge a new trial granted.

Opinion delivered *May 10, 1873*, by

PAXSON, J.—The defendant moved for a new trial in the above case, and assigned a number of reasons in support of his motion. One of said reasons is as follows:

"The judge mistook the evidence of Messrs. Warburton, Greene, Taggart, Rees, Widener, Porter and Tittermary, and instructed the jury with reference to the same, as follows:

"It will be for the jury to say, whether, upon the face of the article in question, aided by this innuendo, and the evidence offered in support of it, they are satisfied beyond a reasonable doubt that the alleged libel meant to include the prosecutor among those who contributed to the fund for the assassination of Brooks. A number of witnesses—Mr. Warburton, Enoch W. C. Greene, John R. Taggart, Jas. Rees, Peter A. B. Widener, Charles A. Porter, and Mr. Tittermary, say, *that they so understood it.*"

This paragraph, prepared in the haste of a jury trial, and which was intended as a condensation of the testimony of the witnesses referred to upon this point, was inadvertently framed so as to express a different meaning from what I intended to convey to the jury. The error is in the italicised portion, being the last five words. The witnesses said they understood David H. Lane, the prosecutor, to be the David Lane mentioned in the article. But they did not say that they understood the article in the *Press* to charge Mr. Lane with being one of those who "contributed to the fund for the assassination of Brooks."

I will not pause to inquire as to the effect of this portion of the charge upon the jury. It may have influenced them adversely to the defendant; and because it may have done so, he must have a new trial.

This view of the case renders it unnecessary to consider the remaining reasons filed in support of the motion.

The rule to show cause why a new trial should not be granted is allowed, and the same rule is now made absolute.

District Attorney Mann for the Commonwealth.

J. H. Gendell, Esq., and *Hon. Benj. H. Brewster*, for defendant.

[Leg. Int., Vol. 30, p. 200.]

COMMONWEALTH *vs.* BROWN.

A partner cannot be indicted for forgery of an instrument of writing with intent to defraud the copartnership.

Motion for new trial. Opinion delivered *June 13, 1873*, by

PEIRCE, J.—The defendant was charged with having forged and

uttered an instrument of writing purporting to be a bill of sale and receipt, as follows, viz. :

PITTSBURGH, May 16, 1872.

Messrs. McCleary & Brown, Philada.
Bought of Rinehart & Stevens.
72 bags of Rio Coffee.

	11,808	
	118—11,690@22	\$2571.80
		25.80
		<hr/>
		\$2546.00
50 bags	8,198	
25 "	3,610	
	<hr/>	
	11,808	

Received payment,
RINEHART & STEVENS,
per Armstrong.

The first two counts of the indictment charged it to have been made and uttered to the prejudice of the right of William McCleary, one of the firm of said McCleary & Brown, with an intent to defraud.

And the last two counts of the indictment charged it to have been made and uttered to the prejudice of the right of said firm of Rinehart & Stevens.

Forgery, at common law, is defined by Sir William Blackstone, as the fraudulent making or alteration of a writing to the prejudice of another's rights; and by Mr. East as the false making or altering or uttering, *malo animo*, of any written instrument for the purpose of fraud and deceit. The offence is consummated by the false making of the instrument, with the intent to defraud without any uttering.

To utter and publish an instrument is to declare or assert directly or indirectly, by words or actions, that it is good.

There was no evidence given at the trial tending to show an intent to defraud Rinehart & Stevens, or that in any way the forged instrument was to the prejudice of their rights. Our inquiry, then, is relative to the evidence given in support of the first two counts of the indictment.

The evidence showed that the defendant Brown, and William McCleary, who was alleged to have been prejudiced and defrauded by the forged instrument, were partners in business, trading as McCleary & Brown.

It was proved at the trial that the defendant had gone to Western Pennsylvania to collect money belonging to the firm, and that instead of returning the money to the firm he alleged that he had invested it in the purchase of coffee for the firm, and produced to his partner the forged bill of sale and receipt as evidence that he had done so.

Is this forgery, either at common law or within the meaning of our statute, which enacts, that, "if any person shall fraudulently sign, make, alter, utter or publish, or be concerned in the fraudulently making, signing, altering, or publishing any written instrument other than notes, bills, checks, or drafts already mentioned, to the prejudice of another's

right, with intent to defraud any person or body corporate, or shall fraudulently cause or procure the same to be done, he shall be guilty of a misdemeanor."

The words, "any written instrument," are without doubt sufficiently comprehensive to embrace the forged instrument in this case. And such an instrument was made the subject of an indictment in *Rex vs. Martin*, 7 Carrington and Payne, 549.

In that case the defendant asked his employer to give him £4 to buy settledated striking acid, to be used in the employer's tanning business, which the defendant superintended. The employer gave him the money, and about four days after the defendant delivered to his employer a forged receipt, as follows, viz.:

May 4, Mr. Martin

Bought of Lang & Son,

Wholesale Druggists, Bristol.

Six quarts of settledated striking acid.

Settled £4.

SAM. HUGHES.

The counsel for the defendant objected that there was no evidence of an intent to defraud the employer, as he had already parted with the money under a false representation, and the offence, if any, was that of obtaining money under false pretences. But Patterson, J., told the jury that if they believed the defendant to have uttered the forged receipt for the purpose of deceiving his employer, that he had applied the £4 to the purpose for which he had obtained it, such purpose being a mere pretence and fraud, they might find him guilty of uttering with intent to defraud her. The jury found the defendant guilty, and upon a case reserved, upon the question whether the learned judge was right in directing the jury as above stated, the fifteen judges were unanimously of opinion that the direction was right.

It appears from the above case, and from well-settled principles of the law, that if the defendant had been in the employment of McCleary, who was alleged to have been defrauded, that the conviction in this case would have been right. But it is affected by the fact that the defendant was a partner of McCleary, and the money received by him was partnership money.

If the defendant had been indicted for stealing the money, which it is alleged he fraudulently appropriated to his own use, he could not be convicted of it, because joint tenants or tenants in common of a chattel cannot be guilty of stealing such chattel from each other. Thus, if A and B be joint tenants or tenants in common of a horse, and A take the horse even *animo furandi*, yet it will not be felony, because one tenant in common taking the whole, only does that which he may do by law. (2 Russell on Crimes, 86.)

And this is so, though a man may be guilty of larceny in stealing his own goods. If A bail goods to B, and afterwards, *animo furandi*, take the goods from B with an intent to charge him with the value of them, it is felony, for there is a sufficient temporary special property in the bailee to support the indictment. *Idem*, 87.

The general maxim is, *furtum non est ubi initium habet detentionis per dominium rei*. In *Regina vs. David Pratt*, 26 English Law and Equity

Reports, 574, the prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his possession as agent of the trustees. Held, that he was not guilty of larceny.

In England it required a special statute (3 and 4 Victoria, chapter 3) to make the members of a banking copartnership liable to indictment for stealing the money or effects of the copartnership, or for perpetrating a forgery in fraud of the copartnership.

It seems that a person who is a shareholder in a joint stock bank, and who knowingly utters a forged acceptance to that bank, cannot be convicted on counts laying an intent to defraud R. B., another of the shareholders, "and others." *Regina vs. Cooke*, 8 Carrington and Payne, 586.

In that case Patterson, J., said: "With respect to the counts laying an intent to defraud the company, of which the prisoner was himself a partner, I do not think it would be safe to rely on them."

As we have no statute making a partner liable to indictment for felony in fraudulently appropriating the money of the partnership to his own use, or making a partner liable to indictment for forgery of an instrument of writing with intent to defraud the copartnership, the case of the defendant comes within the principle of the cases above cited. It was my duty, therefore, to have instructed the jury under the evidence, to have acquitted the defendant.

In doubtful questions of law, as well as in doubtful questions of fact, a defendant *in favore libertatis*, is entitled to the benefit of the doubt.

The verdict is set aside, and a new trial is granted.

L. R. Fletcher, Esq., and *Wm. B. Mann*, Esq., District Attorney, for Commonwealth.

Thos. J. Diehl and *L. C. Cassidy*, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 201.]

COMMONWEALTH vs. ROGERS.

The court not considering the verdict against the evidence or the weight of the evidence will not grant a new trial.

Sur charge murder. Motion for a new trial. Opinion delivered *June 13, 1873*, by

FINLETTER, J.—The defendant was convicted of murder in the second degree, whereupon a motion for a rule for a new trial was made on his behalf. The sickness of both of his counsel prevented an earlier determination of this motion. The reasons filed will be considered in their order.

The first is, "Because the verdict is against the law."

There was no evidence of provocation or of a contest. The wounds inflicted upon the deceased, and which were necessarily mortal, indicated an intent to take life, or to inflict great bodily harm. The homicide was therefore murder. It could not be less. The verdict found the lowest grade of murder, and if there be error in this it is upon the side of mercy, and in favor of the defendant.

The second is, "Because the verdict was against the evidence and weight of the evidence."

A careful consideration of the evidence and of the arguments of the learned counsel has failed to convince us that the jury erred. The testimony was indeed circumstantial, but such, as in our opinion, led inevitably to the conclusion that the defendant, and he alone, inflicted the injuries whereof John Tweedie died. It consisted entirely of the acts and conversation of the defendant at and about the time the injuries must have been inflicted. It was given by his fellow-officers and other occupants of the station-house. The witnesses, if not friendly to him, were not hostile, and we can find nothing in the case to cast a shadow upon their integrity. The verdict is in accord with "the evidence and the weight of the evidence."

The third is, "Because the learned court erred in overruling the defendant's objection to the question by the District Attorney: Could the wounds in the shoulder be inflicted by an instrument like this?" (Stick shown to witness, Dr. Shapleigh.)

We do not exactly understand the nature of the objection to this question. It was not shown in the argument. Dr. Shapleigh made the *post mortem* examination. He was called as an *expert* in all matters touching the death of the deceased. The cause of death, whether natural or violent. The nature and character of the wounds, whether self-inflicted or otherwise. The means used, whether fire-arms or cutting or blunt instrument, were all matters upon which he was a competent witness. How then can the exhibition of an instrument of any kind, followed by the question of the District Attorney, be objectionable? How could it improperly affect the defendant? It might tend to show the means by which the violence was inflicted. It could not in any degree tend to show the defendant's connection with that violence until the Commonwealth had traced it to his possession. The witness had shown that the deceased died from violence. How, in what manner, and by what means that violence was inflicted, were necessary and proper subjects of inquiry. All the surroundings of a homicide may be given in evidence. The Commonwealth subsequently proved that this stick was kept in a desk within a few feet of the very spot in which the deed was committed, and was seen there a very short time before. It was, moreover, shown to be accessible to whomsoever might visit the cell in which the homicide occurred, and was found afterwards in an ash heap some distance from where it had been kept. We cannot see that there was error in the ruling of the court.

The fourth is, "After-discovered testimony."

We have no means of knowing the nature and character of this testimony, except from the statement of counsel upon the argument, that it was evidence to show that the officers were not playing cards on that night, as sworn to by one of the witnesses for the Commonwealth. If this testimony were of substance, it cannot be regarded in the light of after-discovered testimony. It was within the reach of the defendant before and at the time of the trial. We cannot see how it could have availed the defendant if it had been produced. It would have contradicted no material part of the evidence; and it is not pretended that the witness was recklessly or corruptly false in the statement proposed to be met by this "after-discovered testimony."

The fifth is, "Because from the evidence the only time the act could

have been committed was at or about twelve o'clock midnight, and it was proven that the deceased reached for water two hours after this, which he could not have done had he been then injured."

The evidence in reference to this matter is as follows: Walters says, "I saw him again between one and two o'clock in the morning. I saw him with his head tied up. He came up to the door and I gave him a drink of water. He took the water. I asked him what was the matter. He said he felt sick. It was after Sergeant Rogers brought the keys back that I gave Tweedie the water. He came and took it. That was the time he said he felt sick. He made no complaint of ill-treatment as I heard. I had the keys all night; no one, of my own knowledge, was in the cell between the time I put Murphy out (about eight o'clock) and morning. I gave the keys during the night to Sergeant Rogers; after twelve o'clock."

Dr. Shapleigh says, "The injury to the arms must necessarily render them powerless, although a person could use the fore-arm, but with a paralysis of the muscles there would be no force or power."

This testimony does not show that it was impossible for the deceased to take a drink of water after he had received the injuries. If it had it by no means shows that the defendant did not inflict them. It would only show that the witness was mistaken as to the time he did an unimportant act, and one which he doubtless did many times every night. In any event the jury have passed upon this with all the other facts of the case.

The rule for a new trial is refused.

Wm. B. Mann, Esq., District Attorney, for the Commonwealth.

J. T. Pratt and D. W. O'Brien, Esqs., for defendant.

[*Leg. Int.*, Vol. 30, p. 201.]

COMMONWEALTH vs. SMITH.

New trial—Evidence—Alleged insanity of the prisoner.

Rule for new trial. Opinion delivered *June 13, 1873*, by

FINLETTER, J.—Thirteen reasons have been filed for a rule for a new trial. It is unnecessary to consider more than the one which has reference to what the district attorney said to the jury in his closing argument, which is as follows:

"Gentlemen of the jury, you can make no mistake in convicting this defendant, but you may make a mistake in acquitting him. If he be sane now, and was sane at the time of the commission of the offence, the verdict will be right. If, however, he be insane now, or was insane at the time of killing, the Governor, the court, and I, will secure a commission to inquire into these facts, and will see that no injustice be done to him."

The jury, after a consultation of about half an hour, rendered a verdict of guilty of murder in the first degree.

The district attorney with an honorable fairness becoming his position, admitted upon the argument that this language was calculated to affect the minds of the jury, and, in all probability, induced the verdict. He, moreover, joined with the counsel of defendant in requesting the verdict to be set aside.

We must assume, in an application like this, that the language of the district attorney had the effect upon the jury which it was likely to produce.

It was calculated to lead the jury away from the consideration of the question of insanity. When we consider that there were fifteen witnesses upon that question alone, and that the jury consulted about half an hour, it is but just to their fairness and intelligence to conclude that they did not believe it to be their duty to inquire into the sanity of the defendant.

There never was, perhaps, a case which called for more thorough and intelligent investigation than this. The evidence covered the almost daily life of the defendant for years, and had reference to his domestic, social, business, and religious relations, and to his habits of body and mind, as shown by his acts and conversation. It moreover bore unmistakable marks of honesty and truthfulness, whatever might be its value or effect.

We are of the opinion, that, in all cases where the question of insanity is fairly raised by the facts, the testimony of science should be called in, if attainable, to aid in ascertaining the truth. In this case we especially think this should have been done. We, therefore, make this rule absolute.

William B. Mann, Esq., District Attorney, for the Commonwealth.
J. Ross Dubs and Theodore Oehlschlager, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 336.]

DERINGER vs. DERINGER.

The court in a proceeding for divorce may direct that the person, to whose custody the child is given, shall give bond to produce it in court whenever a judge may direct.

Habeas corpus for custody of an infant.

Rule to vacate the order of court requiring security to be entered in the penal sum of \$2,000, that the infant shall not be taken out of the State.

Opinion delivered October 11, 1873, by

FINLETTER, J.—The petitioner's counsel contend, "That the bond is void, and the entry requiring it should be vacated, because *ultra vires*.

"That the question before the court was one of custody of the child. The court decided that question in favor of the relator, and then went further and ordered her to give security. She was not a criminal; not even a defendant; and to secure her child she gave the bond. This is the strongest case of duress we can imagine."

Whilst this may be conclusive against the validity or the enforcement of the bond, it does not touch the question of the authority of the court to require the bond to be entered as a condition precedent upon which the custody should be given to the relator.

The parties were not, in the ordinary sense, plaintiff and defendant. The one invoked the command of the court to the other to bring the child within the protection of the court. The rights of the child were the subjects of inquiry. The custody was but an incident or result, and of legal right belouged to neither party. The learned judge might have disregarded both and given it to a stranger.

It is not easy to see how an order of court, in any case, can be such legal duress as would avoid a bond. If the bond under consideration be void for "duress," what becomes of the recognizance in a criminal case, or the security for an appeal for a stay of execution in a civil case?

The industry of counsel has furnished many authorities which may not be questioned upon the points which they have decided. They are, however, all cases in which the enforcement of the bonds was resisted because they contained provisions either against the law, or not allowed or required by the law. In none of them is the authority to demand the bond contested or decided.

It was further argued "that Art. IX., § 15, of the Constitution of Pennsylvania, declares that emigration from the State shall not be prohibited, and this is binding on the court; that courts of equity have power to grant writs of '*ne exeat regno*' in cases of equitable debts only."

All this may very well be conceded without advancing the cause of the petitioner, inasmuch as the order of court in nowise interferes with her locomotion whithersoever she listeth.

It is also contended that the divorce of the parties changes their rights. It certainly changes the relations of the parties to each other, and in so far affects their relative rights. It does not, however, affect the rights of either in reference to the child. The decree of divorce establishes as judicially ascertained the facts of the libel, and nothing more.

As the authority of the court to make the order has been at least questioned by the argument, we propose briefly to examine that matter.

The writ of habeas corpus brings the infant into the custody of the court. Its present and future welfare is the special concern of the court. The preservation of the rights of the parents is an incident of the proceedings merely, which may not, however, be disregarded. The order of the court is not *res adjudicata est*, and is intended only for the condition of things as they existed at the time of hearing. It may be revoked or modified whenever required by a change of circumstances.

It is, therefore, the duty of the court to preserve in some way its control over the infant, so that it may be able to enforce its future decrees. It would be manifest error to deprive itself of this power by permitting the infant to be taken beyond the jurisdiction, without some provision for enforcing its return. It may, therefore, and should, couple with the transfer of custody the condition, either that the infant shall not be taken out of the jurisdiction, or that it should be returned to the jurisdiction whenever the court shall so order. In either case this may be effected by the requirement of a bond. If this be correct, it would follow that the order of the court is strictly within the line of duty and authority.

Upon examination this view will be sustained by the universal practice of the English courts. In *De Manneville vs. De Manneville*, 10 Vesey, 52, the Lord Chancellor said: "There is a fair suspicion of real danger that the child may be removed out of this county; and then, according to Lord Macclesfield's opinion in the Shaftesbury case, the court must act upon that suspicion. Some *method must be taken* to secure to the court that the person of the child shall remain in the county." An order was therefore pronounced that the defendant and all other persons should be restrained from taking the child out of the kingdom; and he was afterwards ordered to go before the master and give security not to remove the child out of the kingdom.

Such also is the practice of the American courts. In *State vs. King*, 1 Georgia Decisions, 93, we find the following: "It is further ordered that the said Anna King enter into bond by her friends in the sum of \$500, conditioned that the child Emily King be not removed without the jurisdiction of this court."

It is, however, alleged that a condition of things has arisen since the order was made which requires a modification of it. The testimony shows that ever since that event the child and its mother have been supported by the grandmother, whose means are ample, and who now has a permanent residence in Kansas. That the mother has no means of support; that her physical condition is such as to require her to reside in Kansas; that the grandmother has become greatly attached to the child, and in the event of her death, without a will, her daughter would be her sole heir; that the father is without means and dependent upon a small salary as clerk; that he has heretofore failed to provide for the child in any way, and has made no provision for its support hereafter.

The answer of the respondent shows no reason why the prayer of the petition should not be granted, save his affection for the child. It throws obloquy upon the child by averring that its maternal grandfather was a felon, and that its mother has had abortions committed upon herself, which were advised by its grandmother. If these averments were true (and there is no evidence thereof), they were wholly needless, because they were passed upon when the order was made.

They show, however, a malignity of heart, and a disregard for the future reputation and happiness of the child entirely inconsistent with his professions of paternal love. In this connection we may not forget that it is judicially established that his conduct to the mother was "cruel and barbarous, and endangered her life." This is some indication of the nature and character of him who now demands the guidance of the morals and culture of the infant.

There can be no doubt from an examination of the whole case that the best interests of the child, in every respect, would be secured by granting the prayer of the mother.

Is there any reason, legal or otherwise, which prevents us from promoting this desirable object?

The common law made the father the tyrant of the domestic circle. Whilst it left him free to exercise his will in all things, it made the mother and the child abject slaves to that will. It forbade her to make the simplest contract, and yet permitted her, when requested by her husband, to divest herself of all interest in his estate. It is true, with given irony, it required this to be done "of her own free will and accord, and without any compulsion on the part of her said husband." As if the true wife could have any "will" against the request of a husband whom duty and affection alike compelled her "to love, honor and obey." To still more firmly fix the grasp of the father upon the mother's "free will," the law gave him the custody of the child from the moment of its birth. No matter how low and debased he might become; no matter how notorious his debaucheries, or how openly he lived in avowed adultery, he could by legal force snatch the babe from the mother's breast, and the daughter, in the purity of her budding womanhood, from the sweet and holy counsels of the maternal home. And this was called the father's natural right.

It is not to be wondered at that noble, upright, humane judges, when compelled to enforce such "natural rights," proclaimed from the bench that they were "ashamed of the law!"

Catching the true inspiration of free institutions, we have enfranchised the mother and her child. We have denied the father's right to enslave either. When he claims the custody of the child, or attempts in any way to control that custody, he must show that it is consistent with the welfare and happiness of the child.

It should be remembered that upon a full hearing of the parties, the court awarded the custody to the petitioner. The order for security against transportation from the jurisdiction, was to preserve our control over the future of the child. It was not a response to the meritorious conduct of the father, or to any demerit in the mother.

Since that order was made she has obtained a divorce from him upon the ground of cruel and barbarous treatment. For three years and upwards she has supported her child without any aid from the respondent. The adoption of mother and child by the grandmother insures its support and education, and indicates expectations most advantageous to its future welfare.

To permit the order to remain is simply to deprive the mother of her adjudicated right to the custody of the child, and to subject its welfare to the precarious fortunes of a father, without means and barely able to support himself.

We cannot allow his mere caprice to interfere with the welfare of the child. We are compelled to regard its interests even against the claims of natural affection. We may not, in the exercise of our discretion, disregard its physical comforts and training, or its just and natural expectations of pecuniary or other advantage from its present position.

Even the sternness of the English law has been made to yield to the humanity of this principle. Lord Eldon said: "The court would not in general permit the father to disappoint the expectations of his children." "The father is not at liberty to say, I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had, and in consequence of which their views in life are very different from what they would have been without it" (Forsythe's Custody of Children, 24).

Whilst, however, we will revoke so much of the order as requires security that the child shall not be removed from the Commonwealth, in order to preserve our control over its future, we will require its mother to enter security in the sum of \$2,000 to produce the child in open court whenever any judge thereof may so order.

Let a decree be entered accordingly.

Wm. McCandless, Esq., for rule.

Hon. F. C. Brewster, contra.

[Leg. Int., Vol. 30, p. 416.]

COMMONWEALTH *vs.* KEENAN

1. The Commonwealth is allowed to stand aside jurors without assigning cause of challenge.
2. An indictment under the act of May 3, 1871, should charge that the offence was committed in the Twenty-second ward. An indictment general in its terms is not sufficient under this act.

Opinion delivered *December 6, 1873*, by

ALLISON, P. J.—The defendant was convicted of selling liquor without license. He moved for a new trial, first, because the Commonwealth was allowed to stand aside jurors, without assigning cause of challenge. That this right was recognized in England is clearly shown by Judge Ludlow, in the opinion of the court, in the case of *Morrow and Dougherty*, 3 Brewster, 402. The defendants were indicted for a felony, and the conclusion reached by the court upon a thorough review of the law of England and of Pennsylvania on this point is, that at least, in felonies not capital, it is the right of the Commonwealth to stand aside jurors, without assigning cause, until the panel is exhausted. The qualification of the principle, by the words *at least*, results, not from anything that can be extracted from the authorities cited in support of the conclusion of the court, but because it was not necessary in the case then under consideration, to give to the principle a broader application than was required by the facts upon which the question to be decided rested. In support of the general principle are cited 2 Hale's Pl. Cr. 271; 2 Hawkins' Pl. Cr., chap. 43, sec. 10.

At common law, it was the right of the government to challenge peremptorily any number of jurors, without first showing cause, until the passage of the statute of 33 Edward I., stat. 4; Rob. Digest, 338.

But in the construction of this statute, it has been held, that cause of challenges on the part of the prosecution, need not be shown, till the whole of the panel is gone through, and it should appear that a full jury could not be had, without the person so challenged: Co. Lit. 156; *Regina vs. Frost*, 9 C. & P. 136. The language of the statute of Edward is, "That from henceforth, notwithstanding it be alleged by them, that sue for the king, that the jurors of those inquests or some of them, are not indifferent for the king, yet such inquest shall not remain untaken for that cause, but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be enquired of according to the custom of the court."

In this State the right to challenge is regulated by statute. In all cases of treason, misprison of treason, murder, manslaughter, concealing the death of a bastard child, rape, robbery, burglary, sodomy, malicious maiming, and arson, the accused is entitled to twenty, and on the trial of all other indictments to four peremptory challenges. In all cases, the Commonwealth have the right to challenge peremptorily four of the panel of jurors. Upon the subject of standing aside jurors we have never legislated.

The practice of standing aside jurors by the Commonwealth, without presently assigning cause, which was in force in England, has been

exercised in this State, and recognized by the highest judicial authority, as an indulgence granted to the Commonwealth for the furtherance of justice.

When, in consequence of peremptory challenge by the defendant, and the jurymen ordered to stand aside by the request of the prosecutor, a full jury cannot be obtained, then the proper course is to call over the whole panel again, only omitting those who have been challenged peremptorily: *Rosc. C. L.* 210.

Blackstone, vol. 4, 353, says, "It is held that the king need not assign his cause of challenge till the panel is gone through, and unless there cannot be a full jury without the persons so challenged."

In a note to Sharswood's Blackstone, it is stated to be the law, that the practice is the same, both in trials for misdemeanors and for capital offences. This statement is founded on a decision in 3 Har. St. Tr. 319, in the case of Lord Gray and others, who were tried for a misdemeanor.

It is true that this is but a ruling of the lord chief justice upon the trial, and does not seem to have been presented subsequently to the judges in banc for their opinion, and for this reason the authority of this case was earnestly denied on the argument of this motion. But we rather incline to the opinion, that this decision was not questioned, because it was based on the law of England, so well established that there was no room for doubt or controversy. The books will be searched in vain, for such a qualification of the principle as that now contended for by the defendant. In the breadth with which it is everywhere stated, it is applicable alike to all classes of indictable offences; there is no distinction made between felonies and misdemeanors.

The general principle is stated in Wharton's *Crim. L.*, 2 Edit., 305, thus: At common law the government has no peremptory challenges, but unlike the defendant, it is not required to show cause until after the panel is exhausted, having the power of setting aside individual jurors till that period when, if the jury-box be not filled, the set aside jurors will be severally called, and unless adequate cause be shown against them, they will be chosen. Such still is the practice in the federal courts, and in such of the States as have not in this respect superseded the common law by statutes. In Pennsylvania we have no statute which, by changing the common law in this respect, takes from the Commonwealth the right of standing aside jurors. In *Commonwealth vs. Joliff*, 7 Watts, 585, where the prisoner was indicted for arson, it was recognized as a right belonging to the State. The reason is assigned, that the juror may be partial by reason of being bound to the prisoner by feeling, or even confederated with him in guilt, and yet there may be no proofs to sustain a challenge for these reasons.

It is true that in that case the defendant had twenty peremptory challenges, and the right of the State might have been maintained, on the ground that it was necessary to secure to the Commonwealth a fair trial. But it was not distinguished from the class of cases in which to challenge peremptorily is reduced to a less number than twenty, and the general principle is maintained, irrespective of the character of the crime for which a defendant may be placed on trial; that is an indulgence allowed to the State, which can deprive the prisoner of no advantage which it is the policy of the law to allow him, and as there

is nothing in the legislation of this State to deprive the Commonwealth of it, being indispensable to criminal justice, it ought to be allowed. Every reason which applies to the exercise of this privilege in a case of felony, applies with equal, if not greater force, to a case of misdemeanor. It was given to the government in England not only in felonies of murder, but where, in many instances, the penalty of death was attached to the commission of other felonies, and if it was not set aside in *favorem vite* of a prisoner, why should it be where less serious consequences follow a conviction? And as with us the punishment for misdemeanor is in general less than for felonies, the grade of crime ranking lower, and if, as was decided by this court in the case of *Morrow and Dougherty*, it applied to felonies not capital, why should it be taken from the Commonwealth in cases of misdemeanor? We know of no sufficient reason for such a conclusion.

The right to stand aside jurors was recognized in *Warren vs. Commonwealth*, 1 Wright, 45, and in *Hartzell vs. Commonwealth*, 4 Wright, 462, which were cases of felonious homicide.

The second material question raised by the defendant is based on the fact that the indictment does not charge that the offence was committed in the Twenty-second ward. The indictment is general in its terms, and states that the defendant, within the jurisdiction of this court, did sell and retail, and cause to be sold and retailed, less than one quart of rum, wine, brandy and other spirituous and vinous liquors, and less than one gallon of malt liquor, etc., contrary to the form of the act of assembly, and against the peace and dignity of the Commonwealth of Pennsylvania. This is the general form of indictment, which for over a century has been in use in this State, and has always, when questioned, been sustained as constituting a legal charge of keeping a tippling house, or selling liquor without a license.

It was framed upon the return of the constable under the act of April 5, 1860, which provides, that if any person returned as aforesaid, shall be found guilty, he may be punished as provided in the act. This act is special, and applies only to the city of Philadelphia, and is not repealed by the general law of the 22d of March, 1867.

The act of May 3, 1871, called the local option act of the Twenty-second ward, makes it an offence to sell intoxicating liquors within said ward without a license; to this extent it is a re-enactment of the law of April, 1860, but is restricted by its terms to the ward. It prescribes a penalty wholly distinct from that contained in the act of 1860; it provides, that if any person shall be convicted of selling liquor within the ward, without license, he shall be sentenced to pay a fine of \$50 and to confinement in the county jail or house of correction for six months for the first offence, and for the second and each subsequent offence, to a fine of \$100 and imprisonment for one year.

The act of 1860 says, that for a conviction under that act the offender shall be fined in a sum not exceeding \$200 and imprisoned for a term not more than two years. This, it appears to us, makes the selling of liquor in the Twenty-second ward without license a new and distinct offence. Under the act of 1860, within the limits therein prescribed, the punishment is discretionary, while under the act of 1871, the amount of punishment is fixed, from which there can be no departure.

And while the punishment under the act of 1870, when imposed by the court, may be less than that fixed by the act of 1871, it may, in the discretion of the judge imposing sentence, greatly exceed the penalties set forth in the act of 1871.

Then, again, under the later act, a distinction is made in the punishment for a first and any subsequent offence, being doubled both as to fine and imprisonment, which is wholly wanting in the act of 1860. We are for these reasons compelled to hold that the conviction cannot be sustained under the form of indictment upon which the defendant was placed upon trial. This conviction could not be pleaded in bar of an indictment charging the defendant with having violated the act of 1871 by selling liquor in the Twenty-second ward without a license. This is the offence for which the defendant was tried and of which he was convicted. The evidence showed that he resided within the ward, and that the sale of liquor was at the place at which he resided; and as we are required to sentence upon the bill and not upon the evidence, it follows as a necessary consequence that, as the bill does not charge an offence under the act of 1871, or that the sale took place in the Twenty-second ward, the verdict must be set aside.

Rule for a new trial is made absolute.

Lewis D. Vail and George D. Stroud, Esqs., for the Commonwealth.

James H. Heverin and Joseph A. Bonham, Esqs., for the defendants.

[Leg. Int., Vol. 31, p. 13.]

WIDENING OF THIRTY-FOURTH STREET.

The councils of the city by the act of April 14, 1868, are authorized to widen and straighten any street laid upon the public plans of the city. This does not give them the right to extend the street or alter its course.

In the matter of widening and straightening Thirty-fourth street.

Opinion delivered December 31, 1873, by

PERCE, J.—By the 24th section of the act of April 14, 1868, it was enacted, "That the councils of the city of Philadelphia be and they are hereby authorized to widen and straighten any street laid upon the public plans of said city, as they may think requisite to improve the approaches to Fairmount Park."

In pursuance of this act the councils of the city of Philadelphia, by resolution approved October 1, 1870, directed the department of surveys to rearrange the lines of Thirty-fourth street, between Market and Sycamore streets, making the width thereof seventy feet, and from thence connect the same with Thirty-fifth street, of same width, at or near the crossing of the Pennsylvania railroad, so as to reduce the grading thereon for a desirable approach to Fairmount Park.

Subsequently, councils, by ordinance approved June 24, 1871, directed specifically how Thirty-fourth street should be widened and straightened from Market to Sycamore streets. And from Sycamore street northward and westward, it directed it to be laid out of a width of seventy feet, so that the westerly line thereof shall intersect the southerly line of Aspen street, at about the distance of ninety-four feet east of Thirty-fifth street.

Proceedings were then had to widen and straighten Thirty-fourth street, and a jury was appointed to view the premises and assess damages. To

the report of this jury assessing damages numerous exceptions have been filed on behalf of the city, and of several owners of the properties taken. Some of the owners have generously forborne to claim damages, others complain that too little have been awarded to them, whilst the city excepts because it alleges that too much has been allowed to them. Perhaps this general complaint indicates that the jury pursued the just and middle course in the matter.

We have looked at these assessments of damages with care, and whilst we think one or two of them are in excess of what the parties are entitled to recover, yet, looking at all the awards, we think that justice has been substantially done alike to the owners and to the city, and that the report ought not to be set aside on this account.

Thirty-fourth street, as widened and straightened, is intended for one of the great avenues of approach to the park, and will be a part of a continuous route from the southern portion of the city by way of South street bridge. It is important, in view of the rapid approach of the Centennial Exhibition, that this avenue, as well as others, should be speedily opened, paved, and prepared for public travel.

It is due to the city solicitor and his able assistants, to say, that in this case, as in many other cases which have come under the notice of the court, we have been struck with the fidelity to the interests of the city, and the ability with which the affairs of the department have been conducted. Every claim against the city which has come before the court seems to have been examined with scrutinizing care, and has been defended with the same zeal as if the solicitor and his assistants were protecting their own private interests.

I fully concur with the remarks made by President Judge Allison, in a recent case, in which he said: "That the case before him showed the very great care now exercised in guarding the interests of the city, in connection with claims for damages out of the opening, etc., of public highways, and that he was satisfied that the interests of the city in this respect had not at any period within his knowledge been more carefully and intelligently defended than they were at present."

It was argued before us that a jury for the assessment of damages in this case could not be appointed by the Court of Quarter Sessions, under the general road law, because the 26th section of the act of April 14, 1868, which authorized the widening and straightening of streets to improve the approaches to Fairmount Park, directed that the damages for ground and property taken for the purposes of the act shall be ascertained, adjusted, and assessed in like manner as is prescribed by the act to which it is a supplement. That is, by agreement with the owners, or by a jury to be appointed under the park act.

It is a well-settled rule for the interpretation of statutes that they are to be construed according to the subject-matter. The object of the act was to enable the park commissioners to take land for the purposes of a park, not to direct them to widen and straighten streets; that was directed to be done by the city councils; and the ground and property referred to in the 26th section is ground and property taken for the purposes of a park. The commissioners of the park were not to become negotiators and parties to a proceeding for land taken for the widening and straightening of a street. That was left to the operation of the general

road law, which provides that damages may be assessed under its provisions for streets laid out under a special law, and relates to streets in the city of Philadelphia as well as country roads: *Sharet's Road*, 8 Barr, 89; *Smedley vs. Erwin*, 1 P. F. Smith, 445.

The city also filed an exception to the awards of damages to William A. Irvine, Thomas Costigan, J. M. Bummel and Charles F. Goldbeck, as not being entitled to damages under the proceedings in this case. This exception is well taken. The authority of the councils of the city of Philadelphia, under the act of April 14, 1868, section 24, was to widen and straighten any street laid upon the public plan of said city, not to extend a street or alter its course beyond widening or straightening, or to open a new street. The extension of Thirty-fourth street, from Sycamore to Thirty-fifth street, is anything but a widening and straightening of Thirty-fourth street. It alters the course of Thirty-fourth street by an angle of nearly twenty-five degrees from the straight line of the street, and in the distance of three hundred and fifty-five feet carries it over to within ninety-four feet of Thirty-fifth street. It is, in fact, opening a new street, running diagonally from Thirty-fourth street to near Thirty-fifth street, and calling it Thirty-fourth street. This was beyond the authority given by the act to the city councils, which was simply to widen and straighten.

Besides, it seems to be unnecessary that this diagonal street should be opened under this proceeding, even if there were authority for it, as by the act of April 28, 1873, to revise the line of Mantua avenue, that avenue, as a continuous thoroughfare, will traverse in part substantially the same route that is proposed for this continuation of Thirty-fourth street.

All the exceptions to the report of the jury are dismissed except the third exception on behalf of the city, which is sustained, and the report is confirmed so far as relates to the assessment of damages for the opening, widening and straightening of the street from Market street to Sycamore street, and the remainder of the report is set aside.

City Solicitor *Collis*, William Grew, and Robert N. Willson, Esqs., for the city.

William P. Messick, Alexander K. McClure and David W. Sellers, Esqs., for exceptants.

[Leg. Int., Vol. 31, p. 28.]

COMMONWEALTH *ex rel.* JOHN McCABE *vs.* GEORGE HEARNE *et ux.*

A father never having abandoned his child, nor legally committed its control to others, has the right to appoint a testamentary guardian.

Habeas corpus. Opinion delivered January 17, 1874, by

PAXSON, J.—No branch of our jurisdiction involves questions of a more delicate nature than that concerning the custody of minor children. While the rules of law are certain, the application of them to the facts of a particular case is often attended with difficulty, for the reason that regard must be had to the interests and future welfare of the minor, as well as to the legal rights of the parties. Much must be left to the discretion of the court, and upon the sound and judicious exercise of this discretion depends, in many instances, the present happiness and future prospects of the child.

In this case the custody of the minor is claimed by his paternal uncle, who is also his testamentary guardian. The respondents, who are his paternal aunt and her husband, deny the right of the testamentary guardian, and for answer to the writ of habeas corpus, say, that the said minor, Thomas McCabe, when about four months old, was committed by both his parents to the custody of the respondent, Jane Hearne; and that, with the exception of about eighteen months, when he lived with his father, "the custody, possession and power of the said Thomas has remained with the respondents," etc. Witnesses were called by the relator to contradict this return. The facts as they appeared upon the hearing are substantially as follows: The mother of the child died when the latter was about five months old. He was then placed with his said aunt and her husband, and has remained with them since that time, with the exception of about eighteen months, during which his father was living with a second wife. After the death of the latter, the father and child went to board with respondents, and continued with them until the death of the father, in June last. Previous to his death he made a will, the sole object of which seems to have been to appoint his brother, the relator, the testamentary guardian of his child.

To some extent the respondents have contributed to the support of the minor. A part of this support, however, was derived from his father; and it does not appear that the latter by any act abandoned his child, or relinquished the right to his custody and control. The most that can be said is, that he delegated a portion of it temporarily to the respondents.

Since the death of the father the minor continued to reside with said respondents. He has been sent to school, and his clothing and appearance indicate affectionate care. They have no children, and offer to bring him up as their own son, and give him a trade, as well as proper education. I have no doubt the offer is made in good faith, and it is generous and creditable. Their income, however, is not large, and consists almost entirely of the salary of the husband. Such sources of income are always precarious, and in case of its failure in this instance, it does not appear that the respondents have much else upon which to rely. They certainly have not the means to establish the minor in life.

The testamentary guardian is a married man, without any children, and resides in the State of Iowa. He owns a good farm of about one hundred and fifty acres, and says he is worth \$6,500 clear of the world; that it is his intention to adopt the child as his heir; and that he will educate him in accordance with the wishes of his late father.

The minor is a bright, intelligent lad, of about twelve years of age, and expresses a decided preference for remaining with his aunt. As he has no estate, the contest for his custody on both sides must be regarded as springing from a sincere desire for his welfare.

The father never having abandoned his child, nor legally committed his custody and control to the respondents, it follows that he has the right to appoint a testamentary guardian, and that the latter is clothed with all the powers incident to such position. Included is the right to the custody and control of his ward.

Not only is the law of the case with the relator, but I think the best interests of the minor will be promoted by committing him to the custody

of the testamentary guardian. The latter is his uncle, is childless, and proposes to make him his heir. He is under no legal obligation to do so, but his coming on at considerable expense indicates a kind purpose. If brought up here the lad will have to run the gauntlet of the temptations and vices of a large city. How fatal they are to many is only too well known. We have painful evidence of it in the daily business of this court. Some, indeed, escape these perils and rise to prominence; but the road to such distinction is strewn with the wrecks of those who have fallen by the way. In the simple, and perhaps rugged life, incident to the west, there may be less ease and luxury, but more that develops true manhood. The temptations certainly will not be so great. A comfortable independence upon a farm in Iowa is better than an uncertain future in a large city.

The parties to this proceeding ought not to allow their generous strife for the custody of their dead brother's child to interfere with their amicable relations. It is also proper that the respondents should be allowed a reasonable time to prepare the minor for his change of residence. For this purpose they are allowed to retain him in their custody until Monday next, at which time it is ordered by the court that they deliver him into the custody of the relator as his testamentary guardian.

R. H. Hinckley and Chas. N. Mann, Esqs., for relator.

Findlay & Thomas, Esqs., contra.

[Leg. Int., Vol. 31, p. 36.]

COMMONWEALTH vs. MAGEE.

1. A judge may, where the evidence is uncontradicted, tell the jury, that it is their duty to convict.
2. *Commonwealth vs. Keenan*, 30 Legal Intelligencer, 417, followed.

Motion for a new trial and in arrest of judgment. Opinion delivered December 6, 1873, by

PERCE, J.—This motion is made on two grounds:

1. For error in permitting the Commonwealth to stand aside jurors without showing cause of challenge until the panel had been called.
2. For misdirection of the judge in his charge to the jury.

The first question has been disposed of in the opinion of Allison, P. J., delivered this day in the case of the *Commonwealth vs. Keenan*, Legal Intelligencer, Vol. 30, p. 416, for selling liquor without a license, affirming the right of the Commonwealth in cases of misdemeanor to stand aside jurors, as had previously been affirmed in cases of felony in *Commonwealth vs. Morrow*, 3 Brewster, 402.

The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year; one said he thought it was in the month of April; the other said, "one time was in April, I remember."

The defendant offered no testimony. There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence. The counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors.

Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. After carefully stating the evidence to them, I told them that I had no hesitation in saying that it was their duty to convict the defendant. The counsel for the Commonwealth states the charge to have been, "The judge declared that he had no hesitation in saying, that under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment." But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made.

I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contradicted by testimony on the other side; or a witness is impeached in his general character; or by the improbability of his story, or his demeanor, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved.

In *Delany vs. Robinson*, 2 Wharton, 507, Chief Justice Gibson says, "It will not be pretended that a jury may find capriciously and without the semblance of evidence, or that the court may not set aside their verdict for palpable error of fact; and if it may subsequently unravel all they have done, why may it not indicate the way to a wholesome conclusion in the first instance? Without this process of judicial review causes would frequently be determined, not according to their justice, but according to the comparative talents of the counsel. To hold the scales of justice even, a judge may fairly analyze the evidence, present the questions of fact resulting from it, and express his opinion of its weight, leaving the jury, however, at full and active liberty to decide for themselves. The judge who does no more than this, transcends not the limits of his duty." This was said in a case in which there was a conflict of testimony.

It is the duty of the court when it is decidedly of opinion that the evidence given by the plaintiff, supposing it to be all true, does not tend to prove such facts as will in law entitle him to recover, to tell the jury so. And if the jury were, after such direction from the court, to find a verdict for the plaintiff, it would be the duty of the court to set it aside and grant a new trial: *Matson vs. Fry*, 1 Watts, 435, Kennedy, J.

To submit a fact destitute of evidence, as one that may nevertheless be found, is an encouragement to err, which cannot be too closely observed, or unsparingly corrected: *Stouffer vs. Latshaw*, 2 Watts, 165, Gibson, C. J.

It is error in the court to submit a fact to the jury of which there is no proof: *Miller vs. Cresson*, 5 W. & S. 284.

When the evidence on a question is all one way the court is justified in not transmitting the question as one of fact to the jury: *U. S. vs. 1 Still*, 5 Blatch. C. C. 403.

See also *Davis vs. Hardy*, 6 B. & C. 231, in which Abbot, J., says: "Where a witness is unimpeached in his general character, and contradicted by testimony upon the other side, and there is no want of probability in the facts which he relates, I think a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly."

To warrant an unqualified direction to the jury in favor of one party or the other, the evidence must either be undisputed, or the preponderance so decided that a verdict against it would be set aside, and a new trial granted.

The rule with regard to the positive instruction of the court to find facts admits of the qualification, that where the verdict is in strict accordance with the weight of evidence, and justice has consequently been done, a new trial will not be granted, though the direction be positive: *Graham and Waterman on New Trials*, 751.

There are occasions in which it becomes the solemn duty of a judge, in maintenance of the law and furtherance of public justice, to express his opinion clearly and unmistakably upon the facts submitted in evidence. And this was one of these occasions. The law under which the defendant was prosecuted has been openly derided and defied. Bad men have conspired to defeat it. They openly violate it, and perjured witnesses, and juries disregardful of their oaths, have given impunity to the transgressors. And all this has occurred in the very tribunals of justice seeking to administer the law and in the course of its administration. A judge who would hesitate, under these circumstances, to instruct a jury in their duty, would seem to me to be unworthy of the trust reposed in him.

No objection was made to the charge by the counsel for the defendant at the time it was given, and the jury, after deliberate consideration, rendered a verdict of guilty.

The motion for a new trial is refused.

Magee was sentenced to undergo an imprisonment in the county prison for six months, and to pay a fine of fifty dollars and costs of prosecution.

Lewis D. Vail and *George D. Stroud*, Esqs., for Commonwealth.

Joseph A. Bonham and *James H. Heverin*, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 33.]

COMMONWEALTH *ex relatione* FLINT PEASLEE vs. THE SHERIFF.

The distribution of prizes by chance amounts to a lottery.

Habeas corpus. Opinion delivered *February 7, 1874*, by

PAXSON, J.—The relator was arrested by order of the mayor, and bound over by Alderman Beitler, upon the charge of "setting up a lottery." He had taken a room on Chestnut street, above Ninth, and was engaged in selling "prize candy." The latter was in small sticks, worth, perhaps, a penny, and was sold in wrappers, at five cents each. A placard announced that no change would be given for sums less than twenty-five cents. Coupons, entitling the holder to a small sum of money, were placed in some of the packages. These coupons were cashed

on presentation at the counter. Whenever a prize was drawn a large gong was struck to announce the event to the crowd in attendance. The words "no lottery" were conspicuously posted up on the premises. The relator was doing a thriving business at the time of his arrest. There was a considerable crowd in attendance, and purchasers were plenty.

In *Commonwealth vs. Manderfield*, 27 Legal Intelligencer, 1870, p. 86, we had occasion to define an illegal lottery. Briefly stated, it may be said to be the distribution of prizes by chance. Whatever amounts to this, no matter how ingeniously the object of it may be concealed, is a lottery. This relator evidently regarded his occupation as at least questionable, by placing the words "No lottery" upon his premises. An honest man has no occasion to place the words "Not a thief" upon his hat.

The mayor was right in making this arrest. The "prize candy" business is a school in which hundreds of boys are daily receiving their first lessons in gambling. It is time it was brought to the test of the law, and for that purpose this relator is remanded.

[Leg. Int., Vol. 31, p. 84.]

COMMONWEALTH vs. FOX.

1. As there are two acts of assembly requiring licenses to theatres, an indictment against the proprietor of a theatre should allege under which act the charge is made.
2. The duties of a county treasurer, by the consolidation act of 1854, devolve upon the city treasurer.

Opinion delivered March 7, 1874, by

LUDLOW, J.—The difficulty in the present case arises chiefly from the general language used in this indictment.

The charge against the defendant is, that he "did show, hold and exhibit a certain theatre, and did permit and allow certain theatrical exhibitions therein, within the city of Philadelphia, without having first obtained a license agreeable to law for that purpose." Under the laws of the State two distinct kinds of licenses seem to be required. One license is to be paid to the State, and the other to the city.

To exhibit in any building, etc., a tragedy, comedy, circus, or dramatic performance, etc., requires a city license, and if any exhibition of the various classes of entertainments specified in the act of 1864 takes place, except as permitted by the license, a penalty is to be inflicted, which includes a fine and imprisonment, or either, at the discretion of the court.

By the law of 1845, no *theatrical exhibition* shall be allowed without a State license, and the act of 1850, after designating the sums to be paid the county treasurers for licenses, declares that if any person shall attempt to show, hold or exhibit *any such theatre, etc.*, without a State license, the offender may, on conviction, be fined not less than two hundred nor more than one thousand dollars.

A theatre is defined to be "a building appropriated to the representation of dramatic spectacles," "a place for shows," "a play-house." A tragedy is "a dramatic representation;" a comedy is "a dramatic

representation of the lighter faults, passions, actions and follies of mankind," and a drama is defined by the best lexicographers to be either "a tragedy, comedy, play, or a theatrical entertainment." What is the exact legal meaning of an opera has been, and is, the subject of dispute, one court holding that an act to tax theatres does not include opera companies: *Rowland vs. Kleber*, 1 Pitts, 68, and another, in *Society vs. Diers*, 60 Barb. 152, deciding otherwise. So far as we have been able to discover, when the indictment charged that defendant did show, hold and exhibit a certain theatre, and did allow certain theatrical exhibitions, the pleader in substance said that he had either opened a place for shows, or a play-house, and that he exhibited in a building in the city, either a tragedy, or a comedy, or a play; or that he opened for public entertainment a place for "dramatic performances."

It is just at this point that our difficulty arises, for under which act of assembly are we to enter judgment against the defendant? If any man, under the act of 1864, exhibits in any building (among other things) either a tragedy, comedy, play or dramatic performance, what does he in fact do, but open a theatre, show, hold and exhibit a theatre, and allow theatrical exhibitions therein? and if he does this without a city license, he may, on conviction, be sent to prison, while under the act of 1850, in any case, we have only power to impose a fine. All this doubt and difficulty might have been removed by the pleader, had he inserted the word "State" before license in the indictment, and for greater certainty the date of the act of assembly, which had been violated.

Upon one other point made in this case we will only express our opinion upon the law relating to it, without going into an elaborate discussion of the question presented.

We are of the opinion that the tax specified in the act of 1850 may be paid to the treasurer of the city of Philadelphia. The act of consolidation clearly devolved upon the city the duties which in this respect devolved upon the county treasurers, and as the city treasurer is the agent of the city, he has the power to collect this money, and to pay it to the proper authorities of the Commonwealth.

For the reasons first above assigned the judgment in this case must be arrested.

F. Amedee Bregy, Esq., and William B. Mann, Esq., District Attorney, for the Commonwealth.

Lucas Hirst, Esq., for defendant.

[Leg. Int., Vol. 31, p. 172.]

THE CITY vs. THIELE.

A had been ordered by the court to pay \$5 per week for the support of his wife, and afterwards was divorced from his wife by an act of assembly:—*Held*, that he could not be obliged to pay anything further after the passage of the act, but the court declined to vacate the original order.

Opinion delivered May 23, 1874, by

PAXSON, J.—There were two rules entered in this case; one by the defendant to show cause why the order of court of August 27, 1872, requiring the said defendant to pay five dollars per week for the support of his wife should not be vacated; the other rule was entered by the

plaintiff, and was to show cause why an attachment should not issue against the defendant for non-payment of the said allowance.

By way of answer to the rule for an attachment, the defendant pleaded in bar an act of assembly of April 20, 1873, divorcing C. A. Thiele, the defendant, and Marie Louise, his wife, from the bonds of matrimony, and releasing each from all the duties consequent thereon, as though they had never been married. The preamble to said act refers to the presentation of a petition to the Legislature by said Thiele, praying for a divorce, and alleges that "the reasons set forth in said petition are sufficient to entitle him to said divorce, and the courts of this Commonwealth have not jurisdiction to decree divorces in such cases."

The plaintiff alleged that the courts had jurisdiction over the cause of divorce upon which the Legislature acted, and that the statute referred to came within the constitutional prohibition. In *Cronise vs. Cronise*, 4 P. F. S. 255, and *Roberts vs. Roberts*, Idem 265, the rule is laid down, that "special divorce laws are legislative acts, and *prima facie* founded on sufficient cause not within the jurisdiction of the courts; this cause is inquirable into as a fact when not set forth in the act." The grounds of divorce are not set forth in the act now under consideration, beyond the general statement in the preamble before referred to, that "the courts have not jurisdiction to decree divorces in such cases."

Under the authority of the cases above referred to, I regarded an inquiry into the cause of the legislative action as proper. The burden of proof was upon the defendant, and it has not been maintained successfully. *Prima facie* the act divorcing these parties is legal, and we will not presume the Legislature had no jurisdiction. The evidence submitted was not sufficient to overthrow the presumption of regularity which attaches to the act of assembly.

The amount due under our order was fully paid to the date of the act referred to. We are now asked, in case we sustain said act, to enforce payment of the allowance to the time when the defendant came in, and pleaded his legislative divorce. I am of opinion that the latter relieved the defendant from further liability under our decree. He was not bound to plead it at all, excepting in the case of an attempt to enforce the order. I, therefore, decline to grant the rule for an attachment. I also decline to vacate the original order. It is a judicial decree, and was properly made upon a full hearing of the parties. As such it must stand until reversed or set aside by competent authority. Our power to enforce it has been taken away by the Legislature. Our decree is beyond the reach of an act of assembly.

[Leg. Int., Vol. 31, p. 172.]

COMMONWEALTH vs. ELLEN McNERNY *alias* ELLEN O'LEARY.

The statute of limitations is a bar to an indictment for bigamy. It begins to run from the date of the second marriage.

Opinion delivered May 23, 1874, by

PAXSON, J.—The defendant was indicted and tried for bigamy. The jury found specially that she was "guilty of having two husbands at the same time, but that the second marriage was contracted upon a false rumor, in appearance well founded, of the death of the first husband."

A motion in arrest of judgment was filed on behalf of the defendant. It raises the question, which I reserved at the trial, whether the offence was barred by the statute of limitations.

The indictment charges the second marriage to have taken place upon a day which was more than two years prior to the finding of the bill.

It was alleged by the learned counsel representing the Commonwealth, that the crime of bigamy as defined by our statute, is a continuing offence, and the statute of limitations does not apply. If this be so, it is an anomaly in our system of criminal law.

No such exception appears upon the face of the said last mentioned statute. It says, "All indictments which shall be brought or exhibited for any crime or misdemeanor," etc.

It is to be noted that our statute concerning bigamy differs in its terms from those in force in most of our sister States. In all of them cited by Mr. Wharton (Vol. 2, section 2619), the offence described, is that of marrying a second wife or husband during the lifetime of the first. Our statute is peculiar in its phraseology. It says: "If any person shall have two wives or two husbands at one and the same time, he or she shall be guilty of a misdemeanor," etc. With the exception of a modification in the punishment, this act has been in force since 1705. It will be found in 1st Smith's Laws, 29. In a note to page 30 of the book just cited, I find the following: "The offence defined in this act is said to be properly polygamy, and not bigamy, which originally had a different meaning. Bigamy is, however, understood in law to be where a person marries a second wife or husband, the first being living." This is undoubtedly correct. The proper name of the offence of having a plurality of husbands or wives is polygamy, and it is so designated by the statutes of Maine, Massachusetts, Michigan, New York, and Vermont. The word bigamy signifies, as its derivation clearly indicates, being twice married. This was never an offence at common law, although prohibited by the canon law. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow: 4 Black's Com. 163; and see Bac. Abr. tit. Bigamy, in the notes. Burrill defines bigamy to be, at canon law, "the marriage of a second wife after the death of the first, or the marriage of a widow, either of which was considered as bringing a man under some incapacities for ecclesiastical offices." By a corruption of the meaning of the term, bigamy is now understood in law to be "the state of a man who has two wives, or of a woman who has two husbands living at the same time." Bouvier so defines it, and it will be seen that he uses almost the exact language of our act of assembly. It would seem clear that the latter was intended to punish the common law offence of bigamy.

The indictment in this case does not follow the language of the act of assembly above cited, but charges the defendant in terms with a second marriage within the jurisdiction of the court, upon a day named in the bill, and during the lifetime of a former husband, to whom, as charged, she had been lawfully married.

Under this indictment I have no doubt the offence is the second marriage. The first marriage was not a violation of law. It was only when

the defendant entered into a second marriage, pending the life of her first husband, that the law interposes its prohibition, inflicts its penalties, and strikes down the second contract as null and void.

Was the offence complete when the second marriage was celebrated, or was it continuous in its nature, repeated day by day, by reason of the consequent cohabitation of the parties?

In support of the latter view, it was urged, that if it were not a continuing offence, and the statute ran from the time of the second marriage, there would be no way to reach a bigamist after the expiration of the statutory period; that he might then live with his two or more wives in defiance of the law, of public sentiment, and to the injury of the morals of the community.

If this be true, it might be an excellent reason for a modification of the law, but would not justify the court in giving it a construction not warranted by reason and authority.

The object of the statute is to protect the citizen from stale prosecutions. It is called a statute of repose. As bigamy is not excepted out of the statute, the reason ought to be very clear and satisfactory to justify the court in excepting it by judicial construction.

The argument that a bigamist could always escape by concealing his second marriage for two years, is more specious than sound. It could be used with precisely the same effect as to every other offence embraced within the statute: *Commonwealth vs. Hutchinson*, 2 Parsons, 309 is an authority that in cases of bigamy the statute applies.

The offence consists in the contracting of the second marriage, not in the subsequent cohabitation of the parties. The latter may exist either with or without such contract, with its resulting scandal and injury to good morals, and is punishable under the criminal law as adultery or fornication, as the case may be. The contract of marriage does not change the character of the cohabitation, either in law or morals, so far as the guilty party is concerned; but it aids him or her in obtaining the control of the body of an innocent person by a gross fraud. For this reason, the law not only strikes down the contract itself, but punishes the person making it. In the *State vs. Patterson*, 2 Iredell, 346, it is said: "Marriage, or the relation of husband and wife, is in law complete, when parties able and willing to contract actually have contracted to be man and wife, in the form and with the solemnities required by law. It is marriage; it is their contract which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful; and it is the abuse of this formal and solemn contract by entering into it a second time when a former husband or wife is yet living, which the law forbids, because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made, and this unlawful contract the law punishes."

If the petition of the learned counsel who represented the Commonwealth be sound, in order to convict a man of bigamy it would be necessary to prove that he had both wives within our jurisdiction within two years prior to the finding of the bill of indictment. In other words, if

a person residing in Camden, and having a wife there, should desert her, come to this city and marry a second wife here, he could not be convicted of bigamy in this court unless he also brought his first wife within our jurisdiction. It would also lead us to the conclusion that a visitor to our city from abroad, coming from a country where plurality of wives is legalized, and who should be so unfortunate as to bring more than one wife with him, would be liable to a conviction for bigamy and to imprisonment in the penitentiary. And not only here, but in every county in the State through which he might happen to pass with his wives upon a train of cars.

We do not regard our act of assembly as open to any such construction. While it is peculiar in its terms, we are of opinion that it is merely descriptive of the offence of bigamy, which, as we have seen, is the contracting of a marriage by a person who has at the time a former husband or wife living. The offence is complete when the second marriage is celebrated, and the statute commences to run from that time.

This view of the case renders it unnecessary to consider any question arising upon the special verdict. The statute of limitations is a flat bar to this prosecution, and the defendant is entitled to a general verdict of not guilty.

The judgment is arrested, and the defendant may be discharged upon her own recognizance.

P. E. Carroll and Daniel Dougherty, Esqs., for Commonwealth.

John S. McKinley and Joseph T. Ford, Esqs., for the defendant.

[Leg. Int., Vol. 31, p. 172.]

COMMONWEALTH vs. HENNING.

The defendant's admission as to a former marriage may be given in evidence against him to prove such fact.

Opinion delivered *May 23, 1874*, by

PAXSON, J.—The defendant was convicted of bigamy, and the case comes up now upon a motion for a rule for a new trial.

We have already decided in *Commonwealth vs. McNerny*, that the offence of bigamy consists in the celebration of the second marriage during the lifetime of a former wife or husband, and that it is not necessary for the Commonwealth in any such case to prove that the defendant had both wives or both husbands within the jurisdiction of the court.

In this case the defendant married his first wife in Germany. Subsequently he came to this country, leaving his wife in Germany, and married a second wife in this city. The important question raised upon this motion is, whether the fact of his first marriage was sufficiently established.

It is undoubtedly true, that in order to convict a person of bigamy the first marriage must be established as a valid marriage in fact. The law will not presume it as it will in civil cases. Where the first marriage was contracted abroad, it is for the Commonwealth to prove that it was valid by the law of the country where it was contracted.

The Commonwealth offered no proof of the first marriage excepting

the admissions of the defendant. When charged with the first marriage by the second wife he denied it; but when a paper received from Germany, purporting to be a certificate of his former marriage, and containing a record of the circumcision of his child by his first wife, was exhibited to him, he was greatly confused, cried, said he knew he had done wrong, that he had a wife in Germany, and promised to get a divorce from her.

The paper referred to was allowed to go to the jury, with a translation; not as a marriage certificate containing a formal proof of a foreign marriage, but as a paper which had been exhibited to the defendant at the time the conversation referred to occurred and the alleged admissions were made. I am unable to see any error in the admission of this paper. It was as clearly evidence as the conversation in regard to it, and of which, in one sense, it may be said to have formed a part. It was made evidence by the acts and admissions of the defendant.

In Maine, Delaware, Virginia, South Carolina, Georgia, Alabama, Indiana, Texas, Ohio, as well as in England and this Commonwealth, the defendant's admissions as to a former marriage may be given in evidence against him to prove such fact: Wharton's A. C. L., § 2633. The rule has been so held in *Forney vs. Hallacher*, 8 S. & R. 159, and *Commonwealth vs. Murtagh*, 1 Ash. 272. The latter case was tried in this court, and the point in controversy was considered and decided by Judge King, in a very able and exhaustive opinion. At the close thereof he said: "That no misunderstanding may arise as to the extent of this decision, I repeat that I consider that confessions of a prior marriage are only evidence of the fact; that these confessions and acknowledgments derive their force from the time, manner, and circumstances of which they are made, and that connected with these, they may exhibit the most conclusive or the weakest testimony which can be offered of the fact. It is for intelligent jurors, aided by experienced courts, to weigh and discriminate their relative forces."

After a proper caution from the court, the jury found against the defendant upon the question of the existence of the former marriage. I cannot say they were not justified by the evidence.

I do not attach much weight to the argument that the mere admission of the defendant that he had a wife in Germany, was not an admission that he was legally married there, and that his first wife was still alive.

Why should the defendant promise to procure a divorce from his first wife if the marriage were not legal, or his wife were not still alive? Both of these points were embraced in the admissions of the defendant, and have been passed upon by the jury. I see no reason to disturb their verdict. Motion refused.

White & Earle, Esqs., for Commonwealth.

J. W. Brown and Joseph S. Ford, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 332.]

COMMONWEALTH vs. JONES.

An attempt to illegally vote is an indictable offence.

Opinion delivered *October 10, 1874*, by

PAXSON, J.—The defendant was convicted at the special sessions, in June last, of the offence of attempting to vote illegally. A motion was made by his counsel for a new trial, which motion was argued on the last day of the session prior to the summer vacation.

The indictment contained three counts. The first charges that the defendant, not being a qualified voter, fraudulently attempted to vote at the February election in the First division of the Fourteenth ward.

The second charges that said defendant, being otherwise qualified, attempted to vote at said election out of his proper division.

The third count charges that the said defendant, not by law qualified to vote in said division, attempted to vote therein.

Upon the trial it appeared that the defendant was a duly qualified voter; that he attempted to vote in the First division of the Fourteenth ward, and that he was not a resident of that division.

It is therefore clear that this verdict, if sustained at all, can only be so upon the second and third counts.

Upon the argument, the point was raised and pressed with much zeal and ability, that the conviction could not be supported upon either count, for the reason that no offence is charged, either statutory or at common law.

It will be observed that the indictment charges merely an *attempt* to vote illegally.

The sixth section of the act of 6th April, 1870, provides that, "if any person not a citizen of this Commonwealth shall vote, or *attempt* to vote, at any special, general, or presidential election held in this Commonwealth, he shall be guilty of felony," etc. This is the only instance I am aware of in which the statute defines and punishes an attempt to vote illegally; and this applies only to persons who are not citizens of this Commonwealth. It has no application to the case under consideration.

In our criminal procedure act we have a section which provides that, "if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment." Section 50.

It was urged that this section was intended to apply only to such misdemeanors as were an offence at common law. In other words, that it is not an indictable offence to attempt to commit a mere statutory misdemeanor. I am not aware that the statute last above quoted has

ever received a judicial construction. I have endeavored to give the subject the care and attention to which its importance entitles it.

The report of the commissioners on the penal code does not throw any light upon this question. The section itself is new, and they give as a reason for its passage, the fact, that prior thereto, "if on an indictment for felony, it appears that some circumstance is wanted to establish the complete technical offence, the prisoner must be acquitted, although the proofs are perfect of an attempt to commit the crime."

An examination of the authorities leaves me in no doubt upon the law. The general rule is well established, that any attempt to commit a misdemeanor, is a misdemeanor, whether the offence is created by statute, or was an offence at common law. This broad principle was asserted by Baron Parke in the case of *Rex vs. Roderick*, 7 C. & P. 795, and has been adopted by the editors of our leading text books on criminal law: See 1 Arch. Crim. Plead. and Ev. 85; 2 Id. 29; Wharton, 79, 813; and 1 Russ. 84. It was also fully recognized by our own Supreme Court in *Smith vs. The Commonwealth*, 4 P. F. S. 209, where, in a very able and interesting opinion, Chief Justice Woodward reviews the whole subject of attempts, and collects the English cases with great care. Where an offence is made a misdemeanor by statute, it is made so for all purposes: *Rex vs. Butler*, 6 C. & P. 368.

There may be, perhaps, a distinction between misdemeanors which are *mala in se* and such as are *mala prohibita*, as in the case of acts which are not *per se* penal, but made the subject of a statutory fine, as a matter of municipal regulation.

But when the misdemeanor is stamped as a crime by the law, is the subject of indictment, and is punishable by fine and imprisonment, an attempt to commit it is clearly a misdemeanor.

Especially is this the case where the offence is one which affects the public injuriously. All attempts tending to the prejudice of the community are indictable, as an attempt to provoke another to send a challenge: *Rex vs. Philipps*, 6 East, 464; an attempt to bribe a cabinet minister to give the defendant an office: *Vaughan's case*, 4 Burr, 2494; and the same with respect to the promise to a member of a corporation to induce him to vote for the election of a mayor: *Plympton's case*, 2 Lord Raymond, 1377; or an attempt to bribe a jurymen to give a particular verdict: *Young's case*, 2 East, 14; or a judge, with intent to corrupt him in a case depending before him: 3 Inst. 147.

No one of these cases, drawn from the English law, defines an offence which more directly affects the community than the one under consideration. A blow aimed at the purity of elections is a crime against the nation. When the ballot-box ceases to reflect the popular will, we shall be in a condition little better, politically, than a South American republic, if, indeed, it is necessary, even now, to go beyond some of our own Southern States for an illustration.

The view of the law I have indicated harmonizes perfectly with the fiftieth section of the criminal procedure act above referred to, which provides, as already seen, that when a person indicted for a felony or misdemeanor, is convicted of the attempt, he may be punished "in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in

the indictment." This seems a recognition of the broad principle that all attempts to commit misdemeanors are indictable at common law. It is upon this principle that this conviction must rest, as the case does not come within the section above referred to.

The motion for a new trial is overruled, and judgment will be entered on the second and third counts only.

The maximum imprisonment affixed by law to the offence of illegal voting, under the appropriate section of the code, is three months. For the attempt to vote, of which this defendant is convicted, the statute affixes no punishment, and we are obliged to look to the common law. The punishment at common law for an attempt to commit a misdemeanor, is by fine or imprisonment, or both. There would be no propriety, however, in imposing for the attempt the full measure of imprisonment designated by the statute for the completed offence.

John J. Ridgway, Esq., for the Commonwealth.

Christian Kneass, Esq., for defendant.

[Leg. Int., Vol. 31, p. 332.]

REGISTRY LISTS.

Former paupers in the almshouse, who have been discharged as such, but who remain in that institution under contract of service for hire, are entitled to vote as residents of the precinct.

Opinion delivered *October 13, 1874*, by

LUDLOW, J.—The business of purging the registry lists was resumed before Judge Ludlow. Upon the question whether ninety-three persons living at the almshouse are paupers in the sense of the Constitution, so as to deny them the right of voting, the judge having consulted his colleagues, read the following opinion:

The Constitution declares, article 8, section 12, that, for the purpose of voting, no person shall be deemed to have gained a residence (among other reasons) "while kept in any poorhouse or other asylum at public expense;" in other words, paupers shall not vote, and paupers are defined to be persons who are so poor that they must be supported at the public expense: *Bouvier's Law Dictionary*, vol. 2, page 310.

The persons, whose right to vote in the precinct in which the almshouse is situated in the Twenty-seventh ward, is questioned, with, I believe, but few exceptions, were admitted into the house as "paupers," and if the evidence stopped at this point, no question could arise as to their right, for clearly the Constitution declares that they cannot, as paupers, vote. The evidence, however, establishes, first, that as paupers they have not only been discharged, but have the right by law to leave the house at any time, which right, if denied, could at once be enforced by habeas corpus. These persons are therefore no longer paupers, *nor are they entitled to any support at the public expense*. It also appears, secondly, that under authority of the executive officer of the house, approved, as I understand, by the board of guardians, these persons have been employed in the institution in various ways, in all of which they are of and in actual service. For these services they are paid, clothed, and lodged; they do not eat or sleep with the inmates, and are subjected to the same rules which apply to the other employes of the

house, with this single exception, that they may not pass out of the grounds, except under an order, or upon the direction of the steward, who, because they were inmates, must exercise his authority. If these individuals are not paupers, as such, what are they? The answer to this question must be, it seems to me, that they are servants, as such employed and paid; it matters not that the compensation in cash is small, or that they are paid in food, clothing, and shelter. In an action at law could not each man recover from the "city of Philadelphia" the amount of his contract? If this question must be answered in the affirmative, then the mere fact that these men remain in the house has little weight, for from the moment they are discharged by competent authority as paupers, and work for their own support upon legal contracts, they become, no matter how poor they may be, freemen in the true sense of that term, and as such are entitled to their rights, which rights I will guard with the most exact care. Had any evidence appeared in this case, which, for one moment, established the fact that an attempt had been made to evade the letter or spirit of the Constitution, and to pack the institution with voters, I would strike these names from the record. So far, however, from that being the state of the case, the uncontradicted evidence is that, in the cases referred to, these persons have been employed as servants of the institution, from one to ten, and even fifteen years. Should I be mistaken as to any one of the individuals named, I will at any time hear the testimony, and then act according to the principles heretofore stated.

[Leg. Int., Vol. 31, p. 340.]

In the opening of FIFTEENTH, SIXTEENTH, and NORRIS STREETS, through MONUMENT CEMETERY.

A road jury in assessing damages for opening a street must award them "as damages for the opening of the street."

Opinion delivered *October 17, 1874*, by

PAXSON, J.—Fifteenth, Sixteenth, and Norris streets have been opened through the Monument Cemetery in pursuance of the following act of assembly, passed May 6, 1872:

"Be it enacted, etc., that Fifteenth, Sixteenth, and Norris streets, are hereby laid out through Monument Cemetery, of the same width as laid out on existing public plans up to the cemetery lines of said cemetery; and it shall also be the duty of the chief commissioner of highways within sixty days to cause said streets to be opened and paved. . . . In assessing damages for said opening, the cost of suitable enclosure of said cemetery ground on said streets shall be allowed."

A jury to assess the damages caused by the opening of said streets was appointed by the court, upon the petition of the cemetery company, and the report of said jury is now before us upon exceptions. The award is as follows:

"After full reflection and deliberation they (the jury) were unanimously of opinion, and so report, that no damage will be sustained by the said Monument Cemetery Company by reason of the opening of said streets through the said cemetery. They were further unanimously of opinion, and so report, that the cost of a suitable enclosure for said

cemetery, upon the line of the said streets, will be \$34,460, and they accordingly award that sum as the cost of such suitable enclosure."

This sum the jury has assessed upon adjoining owners, in the proportions to which such owners are benefited by the opening of said streets.

Exceptions have been filed by the cemetery company, the city, and a portion of the adjoining owners whose property has been assessed.

The cemetery company desires the report confirmed as to the award for the cost of the enclosure, with the question left open as to whether the city should pay for the land taken by said streets. They estimate its value at about \$40,000.

The city is willing to accept the award of \$34,460, provided it is a finality, and no further question raised in regard to the land taken.

Some of the adjoining owners who have been heavily assessed except to the report upon the ground that under the act of assembly authorizing a road-jury to assess the damages for opening streets upon adjoining property benefited by such opening, no authority exists for assessing upon such owners the cost of building a fence.

A portion, at least, of the apparent difficulty in this case arises from the award of the jury. It is informal and insensible. The jurors have assumed that their duties were twofold:—1st. To ascertain and report the damages occasioned by reason of the opening of said streets; and 2d. To ascertain and report the cost of a suitable enclosure for the above-named cemetery on the line of the said streets.

The jury was appointed to assess the damages, if any, sustained by the Monument Cemetery Company by reason of the opening of the streets aforesaid through the lands of said company. There is nothing in the petition, the order of court, or the law, which authorized or required the jury to "report the cost of a suitable enclosure."

It is true the act of assembly above referred to provides that "in assessing damages for such opening, the cost of suitable enclosure for the said cemetery grounds on said streets shall be allowed."

It required an act of assembly to enable the jury to properly consider and allow the cost of such enclosure as an element of damages for the opening of the streets. The effect of said act is merely to increase the damages by the cost of such enclosure. Whatever sum the jury award must be awarded *as damages for the opening of the said streets*.

Let the report be returned to the jury with instructions to amend it in conformity with this opinion. When it comes back we will dispose of the exceptions.

Court of Quarter Sessions of Bucks County.

[Leg. Int., Vol. 31, p. 360.]

COMMONWEALTH vs. EDWARDS.

One who pursues and arrests a thief who has stolen a mule, is not thereby entitled to the reward allowed by the act of 1821 for the pursuit and arrest of a horse-thief.

Opinion delivered by

WATSON, P. J.—The defendant was tried, convicted and sentenced, at last April sessions, for the larceny of two mules, the property of David

Landreth and Sons. He was pursued and arrested by John Quin, the petitioner, who now asks us to direct the clerk to certify under the act of March 15, 1821, 7 Sm. Laws, 388, that he is entitled to the reward for the apprehension of a horse-thief.

The first section of this act provides that a reward of \$20 and mileage shall be given "to whoever shall pursue and apprehend any person who shall have stolen any mare, horse or gelding." The second section makes it the duty of the court, before which any person or persons are convicted of horse-stealing, to inquire who is entitled to the reward, and to direct the clerk to certify the same to the commissioners of the county in which the owner of the horse, mare or gelding, resides.

The offence of horse-stealing is a distinct and specific one under our laws, and as such has been made punishable by various acts of assembly.

The act of 1870, 2 Sm. Laws, 532, enacted, "that every person convicted of horse-stealing, or as accessory thereto, before the fact, shall restore the horse, mare or gelding, stolen, to the owner or owners thereof, or shall pay to him or them the full value thereof."

In the act of 1829, P. L. 315, the offence is mentioned merely as "horse-stealing," and the Revised Penal Code of 1860, § 105, describes it in the same language.

While the act of 1790 was in force the act under which this petition is presented was passed. They both particularly describe the offence as limited to the stealing of a "horse, mare, or gelding." Indeed, under the strict construction to be given to all penal statutes, we do not see how the expression "horse-stealing," could be construed to extend further, than to these three descriptions of horses; certainly it could not apply to the stealing of a mule.

It has been urged that a mule is of the horse kind; that he who pursues and apprehends a thief who steals a mule, is equally meritorious as he who pursues and apprehends one who steals a horse; that the one as much as the other is within the spirit of the act; and that as the reward is for the furtherance of justice the act ought to be liberally construed, so as to include the former as well as the latter.

We freely admit that the two cases seem parallel, and had we the power to make the law, instead of being under the duty of construing and applying it, we would give the same reward to the one as to the other. But we cannot see how a legislative expression in favor of one who pursues and apprehends a thief for stealing a "mare, horse or gelding," can be construed to extend to him who pursues and arrests a thief for stealing a mule. If we can do this, then we can, by going only one step further, give the same reward for the arrest of a thief who has stolen an ass or a cow. Our safe course in this respect is to abide in the law as it is written.

We are obliged rather reluctantly to dismiss this petition.

Court of Quarter Sessions of Bradford County.

[Leg. Int., Vol. 31, p. 398.]

COMMONWEALTH vs. DR. H. C. PORTER and HENRY C. PORTER.

Druggists and apothecaries having the right to retail liquors for the purpose mentioned in the statutes are retailers *sub modo*.

The word retailer cannot be construed with reference to them and their business as druggists.

It is not to be inferred because the constable in his return calls them "retailers of liquors," that they sold and delivered liquors to be used as a beverage.

Motion to quash indictment. Opinion delivered November 16, 1874, by MORROW, P. J.—The constable's return, upon which this indictment is based, is in the following words: "*Retailer of liquors*, Dr. H. C. Porter & Son." Is this sufficient to support the indictment? The 33d section of the act of 1856 requires constables to "make return of retailers of liquors, and in addition thereto, at each term of the court, to make return on oath, whether, within his knowledge, there is any place within his bailiwick kept and maintained in violation of this act." The return is not in compliance with the latter part of this act. He does not say whether the acts of the defendants were or were not in violation of law—simply returns them as *retailers*; and it is argued this is sufficient, because, since the passage of the "local option law," no persons are licensed to vend liquors in this county, and, of necessity, if the defendants are retailers of liquors, it is in violation of law. This, as a general proposition, may be true, but it has its exceptions; for the fifth section of the act of 1856 allows druggists and apothecaries "to sell unmixed alcohol, or compound, or sell any admixtures of wine, alcohol, spirituous or brewed liquors in the preparation of medicine, or upon the written prescription of a regular practising physician." The act of March 27, 1872 (local option), prescribes "that nothing contained in this act shall prevent the issuing of licenses to druggists for the sale of liquors for medicinal purposes."

The record shows that the defendants were druggists and apothecaries. As such, they had the right to retail liquors for the purposes mentioned in the statute. It is true they had no right to sell them "to be used as a beverage;" but, in the absence of any charge that such was the fact (except what is implied in the word retailer), we will not presume they acted criminally, but the presumption, under such circumstances, is directly the opposite—it is always in favor of innocence. The word retailer must be construed with reference to them and their business as druggists. They are, *ex necessitate*, retailers in one sense; not, perhaps, in the popular sense of the word, but in its exact and proper sense—that is, one who "sells in small quantities." In other words, they are retailers *sub modo*—have the right to sell and deliver liquors for the purposes mentioned in the acts before quoted, and we will not infer, because the constable, in his return, calls them "retailers of liquors," that they sold and delivered liquors to be used as a beverage. For this is the very *gist* of the charge, and the word

retailer in the return, as we have seen, does not show such was the fact.

To test it: Suppose application had been made to the court for a bench warrant upon this return when it was made, and it appeared to the court that the defendants were druggists, the court certainly would have refused to grant it, for the reason that no offence was charged. The constable had returned in part what the law required, and it was consistent with truth and innocence. The indictment stands on no higher ground than the return. The grand jury may make presentments, it is true, but it must be on their own knowledge. *This* indictment was on the return, upon the evidence of witnesses summoned for the part of the Commonwealth. If the return falls, the indictment falls. For if we were to hold otherwise, persons might be indicted on any statement charging no crime, without an examination before a magistrate, or without any presentment by the grand jury. This certainly cannot be done in the State courts of Pennsylvania.

We might end the case here, but we are unable to see by what authority the district attorney laid the indictment against Henry C. Porter. The word "Son," in the return, is not necessarily Henry C. Porter, and so far as we can see from the record, he is named in the indictment without authority, and clearly it cannot be held good as against him. But we think it cannot be sustained against either of the defendants, and the indictment must be quashed.

Rule absolute, and demurrer sustained.

Circuit Court of the United States,
Eastern District of Pennsylvania.—In Equity.

[Leg. Int., Vol. 31, p. 85.]

KEENAN vs. SHANNON et al.

Proceedings in bankruptcy—Injunction issued restraining defendants from collecting any rents from real estate in which the bankrupts have any legal or equitable estate, and appointment of a receiver.

Opinion delivered *March 2, 1874*, by

CADWALLADER, J.—The bill has already been acted upon by the granting of an interlocutory injunction restraining certain defendants from conveying, transferring, or incumbering any property, real or personal, in which the Franklin Savings Fund Society, bankrupts, have any interest, legal or equitable. The case has again been argued upon the complainant's application for an injunction to restrain the defendants, Cyrus Cadwallader, George W. Michener, and Benjamin Satterthwaite, from collecting any rents of real estate in which the bankrupts have any legal or equitable interest.

Before the latter application, the Court of Bankruptcy had under two commissions directed summary inquiries to ascertain, first, the present available value of the mortgage securities, or so-called investments, of which the bankrupts were the acknowledged owners; and, secondly, what has become of the funds which heretofore have been, or ought to have been, in the possession or control of the bankrupts. Neither commission has been reported as executed. There is, however, no dispute, I believe, that the defendant, Cyrus Cadwallader, who was the principal executive officer of the bankrupt company, had used its funds as if they were his own, had speculated with them for his individual benefit, as well as for the alleged benefit of the company, and that all, or nearly all, of the company's alleged securities or investments are mortgages held in his name, or in the names of persons heretofore associated with or controlled by him. The injunction ought therefore to be granted, though a formal amendment of the bill may first be necessary.

What proportion the value of the alleged investments or securities bears to the amount of the debts of the company will probably be known very soon, but cannot now be probably conjectured. Counsel for the defendants have spoken of a committee appointed at an informal meeting of some of the creditors, and it is said this committee entertain a favorable opinion of the probable value of the assets. But this opinion, so far as I can learn, is founded more or less upon an assumption that the average value of all the mortgages approximates that of a certain portion of them upon which a large advance was made by lenders of known prudence. A contrary suggestion by counsel on the other side is, that these mortgages were probably the best of the securities, and may have been selected as the only securities which could be offered to such lenders, and that the remaining mortgages, or certain classes of them,

are therefore probably inferior securities. It is also suggested that incidentally to the breach of trust under which mortgages paid for by the company were created, they may, to an extent as yet unknown, have been for amounts fraudulently in excess of the real value of the security.

In our present ignorance on the subject, it would be rash and unsafe to adopt the former of these opposing theories or conjectures. The presumption should not be in favor of parties, or a party, admitted to have long and systematically violated the most sacred confidence. The gentlemen who are designated as the committee of creditors are, if I understand their counsel rightly, of opinion that Cyrus Cadwallader should be allowed to continue to collect the rents of the real estate. He is, it appears, under engagements to advance from time to time, as buildings are in successive stages of construction, the money required for their completion, and this completion is said to be necessary in order to make some of the mortgages available securities to their assumed value. It is, I believe, admitted that, as between him and the bankrupts, he is bound to make these advances with his own funds. In other words, if there had been no bankruptcy, he could not rightfully have obtained the funds from the moneys of the society.

It is now said that he has no present available resources, except the rents in question, to enable him to comply with his engagements to make the necessary advances. If this means that he is insolvent, independently of his relations to or with the company, the danger of continuing his stewardship may be the greater. But I do not understand this to be the meaning intended.

It is said that this committee represent creditors to a large amount. This cannot be material unless they offer to indemnify the other creditors, who take what seems at present to be a more prudent view of the subject. There may be a class of creditors willing to assume risks which they have no right to ask others to incur.

The former class cannot dictate to the latter.

I was much pained by a remark on the part of the defendants that these proceedings may prevent tenants from paying rents, or may afford them a pretence for not paying. To proclaim the supposition of such a danger might create it where it would not otherwise exist. But the counsel of the defendants have corrected this tendency of the remark by expressing a wish, that if the present application is granted, it should be accompanied by the appointment of a receiver. I am generally averse to this course in bankruptcy, but where the apparent titles to property are such on their face that the marshal cannot act efficiently under the usual warrant, a receivership may in some cases be indispensable. On reflection I think it so here. It will be limited to accrued and accruing interest, and to the interest on mortgages. To avoid complication and expense, the commissioner already appointed for the two purposes which have been mentioned will be appointed the receiver; and he will be authorized, under the provisional direction of the register, to apply the funds in payment of necessary charges, such as taxes, etc., etc. The receiver may also, if he see cause for the benefit of the general body of the creditors, report specially upon any question of the application of any funds in fulfilment of Cyrus Cadwallader's engagements to make the

advances above mentioned; first ascertaining the indubitable safety of the security for such advances, and the present inability of Cyrus Cadwallader to make them from independent sources—and providing for the continuance of his ulterior liability where, and so far as, it ought to continue.

The receiver may employ an out-door collector of the rents under special orders upon tenants by the receiver, for designated amounts, requiring a bond with sufficient surety for such collector's liability, and not giving orders to exceed at any time the sum secured. If creditors proving to a large amount shall, by writing, request that Cyrus Cadwallader act as agent of the receiver to collect any rents, and the receiver shall concur in thinking it is, under the following limitations, expedient, he may, on Cyrus Cadwallader's giving bond, properly conditioned, with sufficient continuing surety, in five thousand dollars, give him orders, never at any one time, in the whole, exceeding that amount, on particular tenants, to pay designated sums, for which, or for their application as the receiver may by writing direct, Cyrus Cadwallader shall account weekly or oftener if required.

As to the defendant, Satterthwaite, the receiver may, if he see cause, do the like, on like conditions, provided that he may, in his discretion, as to this defendant, dispense with the consent of creditors if the other conditions are fulfilled.

As to the defendant, Michener, I do not see at present any sufficient reason to make any order. As to him the application may be renewed if necessary. It would be granted now if he appeared to stand in any relation enabling him under any pretence of right to collect any of the rents.

Any party may apply for directions at any time. These orders may require modification, as the case has not been developed. They will be certified to the Court of Bankruptcy.

The following order was then read:

This case having been heard upon the application of the complainants for an injunction restraining certain defendants, until further, from collecting any rents from real estate in which the Franklin Savings Fund Society, bankrupts, have any legal or equitable interest, the court upon consideration, grants the injunction so to restrain the defendants, Cyrus Cadwallader and Benjamin Satterthwaite, and each of them, their and each of their agents and servants.

And Edwin T. Chase, Esq., is appointed receiver for the limited and special purposes defined in the court's opinion of this date.

[Leg. Int., Vol. 31, p. 126.]

SMITH vs. BAKER'S ADMINISTRATORS.

An action for an infringement of a patent survives against an administrator.

Demurrer to bill of revivor. Opinion delivered April 6, 1874, by McKENNA, C. J.—The complainant's original bill prayed for an injunction, and an account of profits derived by the defendant, Samuel Baker, from the alleged infringement of a patent therein described. Before any decree was rendered, Samuel Baker died, and the present

bill is filed against his personal representatives to revive the original suit, to the end that they may be required to account for the profits so received by their intestate. To this bill the defendants have demurred, on the ground, that, by the death of the defendant, the original bill abated, and cannot be revived, because the cause of action springing from a tort committed by him, does not survive against his personal representatives.

At common law all actions for personal wrongs abate by the death of either of the parties. But the rule is operative upon the form, rather than upon the cause of the action. While, therefore, personal actions in which the general issue is not guilty are ended by the death of either of the parties, yet where, by means of the wrong, the wrong-doer has acquired beneficial property, an action will survive by or against the personal representative of the deceased party, to recover the value of such property: *United States vs. Daniel*, 6 How. 11. An analogous principle is applicable to proceedings in equity, and hence, if an interest or liability, which a suit has been instituted to enforce, is not determined by death, an abatement by reason of the death of any litigant may be averted by a bill of revivor.

An infringer of the rights of a patentee is accountable in equity for the profits accruing to him by the appropriation to his own use of the patentee's invention. These profits are property acquired by the infringer, which rightfully belongs to the patentee. He may, therefore, instead of resorting to an action at law to recover damages commensurate with the loss caused by the unlawful act of the infringer, elect to treat him as a trustee, of the profits realized by him, and enforce his accountability for them, in that character, in a court of equity: *Cowing vs. Rumsey*, 4 Fish. 276. Upon such a basis, the equitable liability of an infringer is clearly not determined by his death, and a bill of revivor against his personal representatives will lie to prevent the abatement of the suit brought in his lifetime to enforce it.

It is urged further, that ~~as~~ there can be no decree for an injunction, the respondents cannot be compelled to account, because the equity for the account is strictly incident to the injunction. This is the doctrine of many of the English cases, of which *Jesus College vs. Bloom*, 3 Atk. 264, is the leading one. *Grierson vs. Eyre*, 9 Ves. Jr. 346; *Baily vs. Taylor*, 1 Russ. & My. 73; *Adams' Eq.* 219. The reason of it is, that as the grant of an injunction necessarily presupposes that the complainant has sustained a loss by the defendant's act, for which in strict right he is entitled to compensation in damages, of which a court of law appropriately has cognizance, and as a claim for such damages would involve the necessity of proceeding in two courts at once, in equity for an injunction, and at law for damages, the Court of Chancery having jurisdiction for the purpose of the injunction, will prevent that circuitry and expense; and although it cannot decree damages for the complainant's loss, it will substitute an account of the defendant's profits. But as was observed by Mr. Justice Grier in *Sickles vs. Gloucester Manf. Co.*, 1 Fish. 224, "the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing," and therefore, "whenever the subject-matter cannot be as well investigated in an action at law, a court of equity exercises a sound discretion in decreeing an account. See

Carlisle vs. Wilson, 13 Ves. 276." The reason of the rule is, however, inapplicable to controversies in the federal courts, involving the rights of patentees of inventions under the laws of the United States, for, as Judge Grier further says, "exercising our jurisdiction in these controversies, not by assumption for a special purpose only, or as ancillary to other tribunals, but under plenary authority conferred by statute, the technical reason which compelled the English chancellor to refuse a decree for an account, where he could not decree an injunction, can have no application." And as this authority is amplified by the patent act of 1870, so as expressly to embrace the allowance of damages in an equitable proceeding for infringement, which were before recoverable only at law, there is no longer the semblance of reason for an imperative observance of the English rule in such contentions as this.

The demurrer is, therefore, overruled.

Horace Binney, Esq., for plaintiff.

Lewis Stover, Esq., for defendant.

Eastern District of Pennsylvania.—In Admiralty.

[Leg. Int., Vol. 31, p. 133.]

B. & J. BAKER & Co. vs. THE SHIP "TROS."

Where salvage services are performed merely by the permission of another wrecking company, which had possession of the vessel, and which services were rendered with the understanding that the wrecking company, and not the vessel, was to be responsible:—*Held*, that the vessel is not liable for such salvage services.

Appeal from the decree of the District Court. Opinion delivered by MCKENNAN, C. J.—The only question, which it is necessary to consider in this case, relates to the right of the libellants to resort to the vessel and her cargo for compensation for the salvage services rendered by them. That they did render valuable services is not denied, nor is the amount claimed for them contested by the respondent; but it is maintained that their services were performed exclusively upon the footing of an engagement by a salvor, who was employed by the master of the vessel, and that, therefore, they have no remedy against the respondent.

The ship was a Norwegian vessel, and on her voyage from Marseilles to Philadelphia, with a cargo of iron, went ashore at Watchapique inlet, on the coast of Virginia, on the 6th of February, 1873. The master left the vessel on the 10th of February, and repaired to Philadelphia, to make arrangements for getting her afloat, instructing the mate, if any aid was offered during his absence, to decline it. On the 12th the libellant's steamer, "B. & J. Baker," arrived at the vessel and proffered assistance, but the mate declined it, informing her captain of his master's instructions. The following day, during a gale, a signal of distress was set on the "Tros," in answer to which a boat was sent from the "B. & J. Baker," and the crew of the "Tros" were taken off. On the next day, the 14th, the officers of the libellant's steamer put a steam-pump on board the "Tros," stating, in reply to an inquiry of the mate, "that if it was not wanted they could take it back again." The master of the "Tros," having made an agreement with the Coast Wrecking Company

of New York, for the salvage of his vessel, that company's steamer "Lackawanna" reached her on the morning of the 15th, when she was given in charge to the steamer's officers, and they went to work to extricate her. "On the evening of the 15th, Capt. Stoddart, of the firm of B. & J. Baker & Co., of New York, arrived at the 'Tros,' when G. W. Chadwick, the officer in charge of the 'Lackawanna,' told him that he was then in charge of the 'Tros;' that Captain Stoddart asked permission to furnish aid in getting her off; that he at first declined to make any use of his force or material, but finally, at the solicitation of said Stoddart, he agreed to employ his lighters, steam-pump, and some of his men, fully explaining to said Stoddart that he employed such force and material as the agent of the Coast Wrecking Company of New York; that he was to be paid by said company according to the usual rates of said company, and was to have no claim whatever upon the ship."

The facts embodied in this compendious statement of the proofs are supported by the uncontradicted testimony of the witnesses. Their import is free from all ambiguity. They establish—

1. That the services of the libellant were declined by the officer in charge of the respondent's vessel.

2. That an agreement was made by the master of the respondent's vessel with the Coast Wrecking Company of New York for the salvage of the vessel and her cargo, and that possession of her was surrendered to that company for that purpose.

- And 3. That the libellants' services were performed only by the permission of the Coast Wrecking Company, and under its direction, with distinct notice that it was to be responsible for their compensation, and not the vessel. Upon what principle or reason then can the vessel be held liable? It is argued that its liability results from the fact that the libellants were the first to render assistance. But this extended only to the relief of the crew, without any contemplated further service. However meritorious it may have been, the saving of human life does not constitute an independent ground of salvage compensation. When it is characterized by great hazard to the salvor, and is accompanied by the preservation of property, it will doubtless enhance the allowance of remuneration for the latter service, but it is only a service of humanity, the value of which is incomputable by any measure of pecuniary recompense.

Certainly no other assistance was rendered before the arrival of the "Lackawanna." It is true that before her arrival they had placed on board the "Tros" a steam-pump, but no use whatever had been made of it. Whatever priority they might have acquired, under other circumstances, by their proximity to the vessel, and their readiness to afford assistance, they did not assume any charge of her, or perform any actual service for her relief. She was not derelict, nor does she appear to have been in a condition of such imminent peril as to require immediate efforts to save her, or to warrant an intrusive interposition by the libellants. She was in the actual custody of an officer on board, and it pertained to him to determine whose assistance should be accepted. Against his will they could not entitle themselves to the character or reward of salvors, and their conduct repels any presumption that they sought to do so: The brig "Dodge," 4 Wash. C. C. R. 651. Their only

title to compensation, therefore, accrued by reason of the services performed after the vessel was put into the possession of the Coast Wrecking Company. The evidence in the cause determines the footing upon which these services were rendered. It seems to me to exclude any other conclusion than that the libellants were subordinate to the wrecking company, as its auxiliaries only, and that they accepted employment from it upon condition that it should be liable for their compensation, and not the vessel. By their own stipulation, therefore, the vessel is not their debtor, and their libel must be dismissed with costs.

Samuel C. Perkins, Esq., for libellants.

Henry Flanders, Esq., for respondents.

[*Leg. Int.*, Vol. 31, p. 133.]

FUTTERER vs. ABENHEIM.

1. The charter party stipulated that the ship should "be discharged as fast as the custom of the port will admit," and demurrage to be charged after the expiration of ten days. *Held*, that after that time she was entitled to demurrage, although it was occasioned by the pre-occupancy of the wharf by other vessels.
2. Where a vessel is required to load or discharge her cargo at a particular dock, and she is there detained by reason of its crowded condition, the delay must be compensated by the charterer.

Appeal from the decree of the District Court. Opinion delivered April 6, 1874, by

MCKENNAN, C. J.—The charter party in this case provided for a voyage from an indefinite port in England to Philadelphia, and for the discharge of the cargo at a wharf to be directed by the consignee on the arrival of the vessel. It was also stipulated, that fifteen days should be allowed the charterers for loading the vessel (if she was not sooner despatched), "and the ship to be discharged as fast as the custom of the port will admit, and ten days on demurrage over and above the said days, at seven pounds per day." The vessel reached Philadelphia on the 13th of September, 1871, when she was ordered to discharge her cargo at Willow street wharf. She accordingly proceeded to that wharf on the 19th September, where she remained until October 9, before she could begin the discharge of her cargo, on account of the pre-occupancy of the wharf by other vessels. For the detention thus caused, the libellant claims the stipulated demurrage and damages in the nature of demurrage.

In view of numerous decisions of the English and American courts, and of the evident justness of the rule, it must be taken as now settled, that where a vessel is required to load or discharge her cargo at a particular dock, and she is there detained by reason of its crowded condition, the delay must be compensated by the charterer. The ship-owner has done all that he was required to do when he has taken his ship to the appointed place of discharge. It is implied in his contract, that he shall then not be subjected to any delay, which is not necessary, to unload his vessel. Detention of the vessel for any other reason, may justly be regarded as the fault of the charterer, because she is placed in the circumstances, by which it is caused, by his act, without right on the part of the owner to escape from them. He is, therefore, rightly held accountable for the consequent loss to the owner.

In *Randall vs. Lynch*, 2 Camp. 352, the ship was in the London docks, to which she was destined by her charter party, and could not be unladen within the stipulated time, by reason of the crowded state of the docks, and Lord Ellenborough said: "The question is, whether the detention of the ship, arising from the inability of the London Dock Company to discharge her, is, in point of law, imputable to the freighter; and I am of opinion, that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London docks, it was impossible for the plaintiff to make any use of her, and to all intents and purposes she was there detained by the defendant. When she was brought into the docks, all had been done which depended upon the plaintiff, and the dock company were the defendant's agents for her delivery. The defendant is as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather, or any other cause."

In conformity to the rule thus stated, many English and American cases have been decided: *Bessey vs. Evans*, 4 Camp. 131; *Barret vs. Dutton*, Id. 333; *Hill vs. Idle*, Id. 327; *Philadelphia & Reading Railroad vs. Northam*, 2 Ben. 1; *Davis vs. Wallace*, Man. 1st Cir. 1868, per Clifford, J. It is true, that *Rodgers vs. Forresters*, 2 Camp. 483, and *Burmester vs. Hodgson*, Id. 488, are in apparent conflict with these cases. But they were decided upon proof of a custom prevailing at the London docks, with reference to the discharging of the special kind of cargo with which the vessels were laden, and upon the effect under this proof of a stipulation, express or implied, in the charter party, that the freighter should be allowed "*the usual and customary time*," for unloading the vessels. Beyond this, they have not been followed in England, for, as was said by Boville, Chief Justice, in *Topscoth vs. Balfour*, Law Rep., Part 1, January, 1873, 52, "the rule is, that when a port is named in the charter party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port; not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer." The charter provided for the selection of the dock by the freighters, and they named the Wellington dock, and the chief justice says further: "Treating the charter, as I have before said it must be treated, viz., as though it provided that the ship should proceed direct to the Wellington dock, then any loss arising from the state of the dock must fall, according to the authorities, on the charterers, and not on the ship owner." He held, however, that delay arising from the exclusion of the vessel from the dock, in pursuance of its established regulations, was not imputable to the charterer, for the reason that the parties must be taken to have known such regulations, and to have made their contract in reference to them. But for detention caused by a fortuitous condition of the dock, which obviously could not have been foreseen or contemplated when the charter was made, the charterer was adjudged to be accountable. And such must be regarded as the rule which is established by the preponderating weight of authority.

The learned counsel for the respondent has, however, argued with great earnestness, that this rule is not applicable in this case, because of the terms of the charter. It contains this clause: "And the ship to be discharged as fast as the custom of the port will admit;" and it is urged that this means that the vessel must await her regular turn for a berth at the wharf appointed for her discharge. As a vessel seeking a berth to unload, has no right to displace another which is in it before her, she must necessarily wait her turn, and as the custom to do this is universal, every charter must be taken as made with reference to it. If the meaning ascribed to the clause then be its true meaning, it only expresses what is implied in every charter. And yet, in the numerous cases referred to, it was held, that the unavoidable observance of the custom did not relieve the charterer from accountability for the consequent loss. But I do not think it is to be so construed. It does not refer to the time when the discharge of the vessel is to be begun, but to the process of discharging her. If there should be any special custom at the port of Philadelphia, by which the unloading of the vessel would be delayed, the charterer was not to be accountable for it. And by this reference to it as a custom of the port of Philadelphia, it is not reasonable to regard it as applicable to a custom which is not peculiar to that port, but of general and universal prevalence.

For the loss, therefore, resulting from the condition of the dock, the respondents must, therefore, be held liable. The whole loss, including the stipulated demurrage and damages, is accurately computed at \$736.33, in the decree of the District Court. That decree is therefore affirmed, and a decree will be entered in this court for the sum so adjudged by it against the respondents, with interest from June 7, 1873, and costs.

J. Warren Coulston, Esq., for libellants.

Morton P. Henry, Esq., for respondent.

[Leg. Int., Vol. 31, p. 148.]

THE NORTHWESTERN FIRE EXTINGUISHER COMPANY *et al.* vs. THE PHILADELPHIA FIRE EXTINGUISHER COMPANY.

1. A mistake in the Christian name of a grantee of a patent will not render the patent invalid, if his identity is otherwise established.
2. The grant of letters of administration by a competent court will be presumed to be regular. Also the reissue of the patent to the administrator of the patentee.
3. The patentee having assigned the patent before his death, his administrator is trustee for the assignee, and the heir is not a necessary party to an action for infringement.
4. The record of a rejected application to the patent office, the specifications, models, etc., are admissible in evidence on a question of novelty of invention.
5. Graham having invented, and in 1853 perfected, a practical mode of extinguishing fires by the combined agency of carbonic acid gas and water, the invention of Carlier and Vignon is invalid from want of novelty.
6. The mechanical combination of appliances for generating carbonic acid gas claimed by Carlier and Vignon, are not novel, having been invented by Nichols in 1854, and applied to the production of soda water.

Opinion delivered April 6, 1874, by

MCKENNAN, C. J.—This bill is founded upon a reissued patent to Dawson Miles, administrator of the estate of Phillipe F. Carlier, de-

ceased, and Alphonse A. C. Vignon, as joint inventors of an "improvement in extinguishing fires." They are described as residents of the city of Paris, and subjects of the Emperor of France at the time of the invention. The answer denies that there was any person named Phillipe F. Carlier, and avers that Francois Phillipe Carlier was the name of Vignon's associate in the alleged invention; and for this misnomer it is urged that the patent is void.

It was the opinion of the judges in *Humble vs. Glover*, Cro. Eliz. 328, that an omission or mistake of the Christian name of a grantee rendered the grant void; and so the rule is stated by Lord Bacon, *Maxims*, 107. But even then a different rule prevailed with regard to wills; for extrinsic evidence was admitted to ascertain the person, when two were of the same name, or when there had been a mistake in the Christian name of the devisee. *Cheyney's Case*, 5 Co. 68; *Ulrich vs. Litchfield*, 2 Atk. 376. Lord Coke, however, held (Co. Litt. vol. 2, p. 255, *Thomas' Ed.*) that a misnomer of a grantee would not avoid the grant, where he was so otherwise described as to individuate him; and he says, "So it is if lands be given to Robert, Earl of Pembroke, where his name is Henry; to George, Bishop of Norwich, where his name is John; and so of an Abbot, etc., for in these and the like cases there can be but one of that dignity." Chief Justice Kent refers approvingly, in *Jackson vs. Stanley*, 10 Johns, 136, to this statement of Lord Coke, and says, "In all the cases which I have seen, where there was a misnomer, there was some description connected with the name, and there was no other person who set up a title in competition under the erroneous name." But he does not hold the admission of parol evidence to identify the grantee to be erroneous. Indeed it is the obvious sequence of his argument that such evidence would have been held admissible to show the person intended by the patent in question, if any description had been connected with his name. So, therefore, in the subsequent case of *Jackson vs. Goes*, 13 Johns, 524, Chief Justice Thompson says, "The identity of the grantee, as well as of the thing granted, must, generally speaking, partake more or less of a latent ambiguity, explainable by testimony, *de hors* the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee." It may, therefore, be stated as the result of these and numerous other judicial decisions, that a grant is not necessarily void by reason of an error in the Christian name of the grantee, and that where it contains any other matter descriptive of the person for whom it was intended, extrinsic proof of such matter is admissible to identify the grantee, and, if he is thus identified, effect will be given to the grant accordingly.

Whatever may have been Carlier's proper Christian name, Phillipe Francois, or Francois Phillipe, or only Francois, the patent contains a further designation of the patentee, by which his identity can be certainly determined; and so it is not necessarily void. It describes him as a joint inventor with Alphonse A. C. Vignon of the specific invention set forth in it, and thus it is clear upon the face of the patent, that a person named Carlier, who sustained that relation to Vignon, was the intended patentee. Now there is no evidence that there ever was but one person named Phillipe Francois, or Francois Phillipe Carlier, and

there is no controversy that a person bearing one or the other of these Christian names was associated with Vignon in the invention claimed. Indeed, the answer concedes this, for it admits that Francois P. Carlier, either conjointly with Vignon, or separately, did discover and invent improvements, in connection with apparatus, for extinguishing fires. Assuming, then, that the Christian name of Carlier was Francois P., he is demonstrated to be the same with Phillipe F., by conclusive proof of his connection with the subject of the patent, and of the impossible applicability of the additional description to any other than Vignon's associate. There is, therefore, no doubt of the personal identity of the patentee, and the most that can be said is, that, by a transposition of his double Christian name, he is not thereby accurately designated. But this, according to the rule before stated, will not avoid the patent, where it supplies upon its face an added description, by which the patentee may be certainly identified. The patent must, therefore, be treated as valid.

It is a familiar rule of law that the validity of a judgment of a court of competent jurisdiction is not open to inquiry in a collateral proceeding. A judgment without authority to render it is certainly a nullity, but an erroneous judgment is to be treated as valid until it is reversed or annulled by some direct proceeding to that end. If the court which pronounced it has jurisdiction over the subject-matter, a proper case for its exercise must be presumed to have been sufficiently presented, and the adjudication to have been right. Accordingly, the judgment of the Probate Court of Massachusetts, awarding to Dawson Miles letters of administration upon the estate of Carlier, must be taken as conclusive of his legal right to the grant of them. That court has undoubted general jurisdiction over the subject, and we must assume that all the facts, which the laws of the State prescribed as essential to its judgment were sufficiently shown to exist. We certainly have no authority to revise or disregard its decision.

And the same principle applies to the granting of the letters patent by the commissioner of patents. It must, therefore, be taken for granted that the person in whose name the patent was issued established his legal right to it before that officer, and we cannot go behind it to ascertain whether this was so or not.

But it is urged that the commissioner could only grant the patent to the administrator of Carlier in trust for his heirs, and that, therefore, his surviving daughter is a necessary party to this suit.

There is no doubt that the act of Congress (Brightly's Dig. 729, sec. 39) imposes upon a patent issued to the administrator of a deceased inventor a trust in favor of his heirs. But it is not essential to the validity of the patent, or to the efficacy of the trust, that the persons to whose benefit the patent will enure should be named upon the face of it: *Stimpson vs. Rogers & Co.*, 4 Blatch. 333. Primarily, therefore, the patent must be considered as a grant to the heir at law of Carlier, Miles holding it simply as her trustee. Under these circumstances Carlier's heir would undoubtedly be a necessary party to this suit, because a decree in favor of the present complainants would adjudge the profits, claimed from the defendant to them, irrespective of the beneficial right of Carlier's heir, and would leave the defendant exposed to another suit for the same profits at her instance.

But the act of Congress further provides that the administrator of the deceased inventor shall hold the patent granted to him, "under the same conditions, limitations and restrictions as the same was held, or might have been claimed or enjoyed," by the inventor in his lifetime. The import of this provision is that, while the legal title to the invention is devolved upon the administrator, he must take and hold it subject to any equities existing, as against the inventor in his lifetime. Now, the documentary proofs exhibited show that Carlier, in his lifetime, parted with his inchoate or equitable title to the invention, and that this title is vested in the American Fire Extinguisher Company. If he had lived and obtained the patent, he would unquestionably have held it for the use of those upon whom the beneficial ownership of it was devolved by his own act before it was granted. And his administrator holds it under exactly the same conditions, and subject to the same limitations of his interest in it. Carlier's heir, therefore, thus forestalled by his assignment, has no actual interest in the controversy, and to make her a party would be only a superfluous form. The main inquiry in the cause relates to the novelty of the invention claimed by Carlier and Vignon. I have no doubt they were original inventors, but were they the first?

The earliest date to which their invention is carried back is June, 1862. Although there is no evidence in the cause fixing this date, yet, from what incidentally appears, and for the purpose of determining the priority of their invention, it may fairly be taken as the time when their invention was completed.

What, then, did they claim to have invented? This is very clearly described in the reissued patent in controversy.

"It consists," says the specification, "first, in the process or method of extinguishing fires by means of a jet or stream of mingled water and carbonic acid ejected from a closed vessel in a suitable direction by means of the pressure or expansive force of the mixture contained in the vessel; and, secondly, in the construction of apparatus for containing and delivering this extinguishing medium, which apparatus may be made of an exceedingly portable nature, and kept always charged and ready for use at a moment's notice at the particular locality which it is desired to protect." The patent then seeks to appropriate two things—1, a method of extinguishing fire, by throwing upon it a stream of mingled carbonic acid gas and water by means of the pressure or expansive force excited by the mass of mingled gas and water from which the stream is derived; and, 2, the specific mechanical devices described in the specification, by which this method is made practically effective.

To show that the invention thus claimed is not novel, the defendants have exhibited in evidence, a rejected application of Dr. William A. Graham. It appears that on the 23d of November, 1837, Dr. Graham applied for a patent for a method of extinguishing fire, by projecting upon it a stream of mingled carbonic acid gas and water, and filed a specification, in which he fully described the mechanical devices to be used in effectuating this method, and the process of operating them. On the 25th of November, 1837, his application was rejected, for reasons stated by the examiner, which now seem strange enough. This decision was reaffirmed on the 16th of December following. On the 29th of December, 1837, an amended specification was filed, and thus the case stood

until December, 1851, when a model and drawing and a third specification were filed, and the application was renewed and finally rejected. These several specifications and the drawing are all in evidence in the cause; and it is urged that *they, of themselves*, are effective proof of prior invention by Graham.

The argument claims too broad an effect for them. It puts them upon the footing of a publication, and ascribes to them the effect which the act of Congress gives to that. But they cannot be so treated, because they lack the essential quality of a publication, in that they were not designed for general circulation, nor were they made accessible to the public generally. They were placed in the custody of the commissioner of patents, not that they might thereby become known to the public, but for the special purpose of being examined and passed upon by him.

Although they might incidentally become known to any one whose researches in the patent office might disclose their existence, they are not therefore published within the meaning of the act of Congress.

But it is said they established the fact of invention, and so disprove the novelty of an invention subsequent in date. It is needless to refer to authorities to show what is so well settled, that a written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws. It may be so full and precise as to enable any one, skilled in the art to which it appertains, to construct the machine described, but until it has been embodied in a form capable of useful operation, it has not attained the proportions or the character of a complete invention. However suggestive and valuable it may be as an untried theory, it is ineffective against the practical and useful product of inventive skill.

But it does not follow that a rejected specification and drawings are, under all circumstances, inadmissible as evidence. By themselves, they are inconsequential, but when the inventor's idea is perfected by a practical adaptation of it, in the form of mechanism, they are valuable guides in ascertaining the date of the invention, the design of the inventor, and the principle, intended functions, and mode of operation of his mechanism, and they must, therefore, necessarily be considered in connection with it.

So in the present case, Dr. Graham embodied what he supposed he had discovered in a practical form; for, the proofs establish, beyond question, that as early at least as 1853, he constructed apparatus, which he then exhibited. We may then consult his several specifications to ascertain the nature and object of his invention, and how he proposed to effectuate it.

While it was well known that carbonic acid gas was heavier than atmospheric air, that it had great compressibility, and was incombustible, yet no method had been devised of making it available for extinguishing fires. Dr. Graham seems to have been the first—as he certainly was prior to Carlier and Vignon—to conceive the practicability of this application of it, and his specifications show that he had an intelligent comprehension of it. In one of these he says: "What I claim as my invention or discovery, and desire to secure by letters patent, is the invention or discovery how carbonic gas, condensed in water (in the proportion

of more than two of the former to one of the latter), in movable or portable fountains, or fixed reservoirs, can be usefully applied to extinguish fire—the gaseous water passing along the hose tube to the discharge pipe, from whence it issues at a number of *termini*, through small tubes, holes or apertures; the distance to which a stream of gaseous water can be projected, depending upon the size and form of the holes or apertures from which it issues. In other words, I claim and specify to have invented or discovered how carbonic gas incorporated and condensed in water, and connected with machinery, can be projected the necessary distance by its own elasticity, issuing through and from syringe-formed tubes, with small holes or apertures, and with the necessary uniformity of efflux to produce a useful effect, a new result—that of arresting, at small expense, and quickly, the conflagration of houses, ships, boats, railroad cars, and all combustibles on fire.”

Now, it is very clear that this extract is identical in import with that portion of the specification of Carlier and Vignon, which describes and claims as part of their invention “the process or method of extinguishing fires by means of a jet or stream of mingled water and carbonic acid, ejected from a closed vessel in a suitable direction by means of the pressure or expansive force of the mixture contained in the vessel.” So Dr. Graham proposed the condensation of carbonic acid in water contained in a closed vessel, either portable or stationary, and the application of it to the extinguishment of fires, by ejecting the mixture from the vessel in a suitably directed stream, by means of its expansive force.

But did he devise mechanical appliances to practise his method?

The answer to this is to be found also in his specifications. He says: “The machinery or apparatus consists of a generator, gasometer, forcing pump, fountain or fire-extinguisher, and a hose tube.” He then directs the manner of generating the carbonic-acid gas and of charging the fountain, and proceeds: “The fountain or fire-extinguisher may be of any capacity commensurate with the wants of the place or situation where it is intended to be used. It may be made of wood, or it may be a very strong cylindrical copper vessel, with hemispherical extremities, and tuned on the inside, similar to the mineral fountains above alluded to. The mouth of the fountain should be accommodated with a screw B and B; to fit it to the screw is a stop-cock D D, connected with a tube E and E, one end of which passes nearly to the bottom of the fountain. The hose tube is connected to the fountain in the ordinary way, F; it may be of any required length; and should be strong, and made of some flexible material, with a screw at one end, and this end should have nearly the same diameter with that of the fountain tube to which it is to be connected.”

“The hose tube from the end to be attached to the fountain tube should approach gradually to a very small orifice at the farther or outer end. For an eighteen or twenty gallon fountain, the outer orifice, or aperture, should not be more than the twentieth of an inch in diameter. When the carbonic acid is to be applied to extinguish fire, the hose tube must be attached to the fountain tube O.”

“The condensed contents of the fountain you command by a stop-cock. By turning the stop-cock, the carbonic acid from its elasticity will pass rapidly along the hose; and the gas combined with the water

issuing from an extremely contracted orifice as indicated above, is projected to a great distance, and striking the fire or flame with a gaseous energy and elasticity, it is instantly extinguished. The water serves the double purpose of enveloping the gas and of reducing the temperature, so as to prevent rekindling."

As early at least as 1851, a model and drawings of the apparatus described in the specification were filed by Dr. Graham in the patent office. With the aid of all these there certainly could be no difficulty in constructing the necessary apparatus for the practical application of the invention. Indeed such apparatus was constructed by Dr. Graham as early at least as 1853, and it was produced at the hearing—with the immaterial substitution of a piece of new hose for the old piece originally attached to it—its identity having been incontestably established.

Having thus fully and intelligently expounded the theory of his invention, and described the constituent parts and functions of the mechanism by which it was to be reduced to practice, it remains to inquire whether the apparatus constructed by him was capable of practical operation and use.

Upon this point I think the proof is plenary. It appears that in 1852 or 1853, Dr. Graham made a trial of his apparatus near Lexington, Virginia, in the presence of a large number of witnesses, by setting fire to a large pile of straw, and then throwing upon it a stream of mingled water and carbonic-acid gas projected from his extinguisher by the expansive force of the gas. That this trial was successful is apparent from the fact that the progress of combustion was promptly arrested, and the failure to extinguish the fire entirely was manifestly due solely to the insufficient capacity of the extinguisher, as compared with the magnitude of the ignited material. The incompatibility of carbonic-acid gas with fire needed no proof, because it was an indisputable fact; the problem to be demonstrated was the practicability of the proposed method of discharging and directing carbonic-acid gas in combination with water upon an ignited mass, whereby the well-known properties of both these substances could be made usefully available. So far as this result was concerned, the trial made must be considered as having proved the utility and efficiency of the invention.

But equally, if not more, satisfactory proof was furnished at the hearing of this case. The same appliances used by Dr. Graham on the occasion referred to had been made exhibits in the case, were produced in court and were subjected again to the test of trial. They consisted of a metallic fountain or closed vessel, charged with carbonic-acid gas and water, to which was attached leather hose ending in a bunch of nozzles, and alternately a single nozzle. When the stop-cock opening into the hose was turned, a stream of mingled gas and water at once issued from the nozzle, and, by means of the expansive force of the contents of the vessel, was projected to a distance, exceeding that stated by Dr. Graham in his specification, until the vessel was emptied.

Against the pressure of all these proofs, I cannot resist the conclusion, that Dr. Graham devised an original method of extinguishing fires by the combined agency of carbonic-acid gas and water, and that he "perfected and adapted" his invention, by embodying it in the form of mechanical appliances, capable of operative and successful use.

It was urged, however, that the efforts of Dr. Graham are to be treated as abandoned experiments. An experiment may be a trial, either of an incomplete mechanical structure, to ascertain what changes or additions may be necessary to make it accomplish the design of its projector, or of a completed machine to illustrate or test its practical efficiency. Obviously, in the first case, the incompleteness of the inventor's efforts, if they were then abandoned, would have no effect upon the rights of a subsequent inventor.

But if the experiment proves the capacity of the machine to effect what its inventor proposed, the law assigns to him the merit of having produced a complete invention.

It is hereinbefore shown that the theory of Dr. Graham attained this practical condition; and there, apparently, his efforts ceased. But why? Repulsed from the patent office by the arbitrary assumption that his enterprise was impracticable with the employment of any mechanical auxiliaries whatever, without pecuniary resources, his "poverty, not his will, consented" to an abandonment of further effort to secure the full benefit of his invention to himself and to the public. But this will not help the complainants. The most that can be predicated of his inaction is, that he abandoned his invention to the public—although I do not affirm this hypothesis. But if he did, it will not reduce his matured invention to the grade of a mere experiment, and open the way to the complainants to appropriate the title of the first inventor.

Nor do the facts in this case bring it within the principle of *Gayler vs. Wilder*, 10 How. 477; or of *Parkhurst vs. Kinsman*, 1 Blatch. 488; or of *Roberts vs. The Reed Torpedo Co.*, 3 Fish. 629. In the first of these cases, the alleged prior invention had not been subjected to any trial to test its essential utility; it had disappeared; and the fact was found that "there was no existing and living knowledge of the improvements or of its former use" at the time the subsequent inventor made his discovery. It was thereupon held that "a prior construction and use of the thing patented, in one instance only, which had been finally forgotten or abandoned, and never made public, so that, at the time of the invention by the patentee, the invention did not exist, will not render a patent invalid;" and at least one passage of the opinion of the court is of marked significance in its application to the facts proved in this case. The court says, "We do not understand the Circuit Court to have said that the omission of Conner to try the value of his safe by proper tests would deprive it of its priority; nor his omission to bring it into public use. *He might have omitted both, and also abandoned its use, and been ignorant of its value*; yet, if it was the same with Fitzgerald's, the latter would not upon such grounds be entitled to a patent, provided Conner's safe and its mode of construction were still in the memory of Conner before they were recalled by Fitzgerald's patent."

In *Parkhurst vs. Kinsman*, the alleged prior invention was rejected upon the ground "that it was neither so far perfected by experiment, or by a reduction to practical operation, as to entitle it, in judgment of law, to the character or attribute of an invention," and that the "evidence of the abandonment of the thing as a failure" was decisive.

So far as to *Roberts vs. The Reed Torpedo Company*, the experiments of Reed had failed entirely of producing any useful result, and were

abandoned; and for this reason they were treated as insufficient to establish priority over Roberts, whose patented invention had been "perfected and adapted" to successful use.

There is, therefore, in my judgment, no sufficient reason why the merit of having invented a complete and practical method of extinguishing fires by the combined agency of carbonic-acid gas and water should not be awarded to Graham. This necessarily limits the scope of the complainants' patent to the devices and combination of devices, described in it, which are not substantially embraced in Graham's extinguisher.

At the hearing of this case the discussion was confined to the *first, second, third, fourth, ninth and tenth* claims of the complainants' patent, because it was these claims only which the defendant was alleged to have infringed. The present inquiry, therefore, need not be extended beyond them.

From what has been already said, the first claim of the patent cannot be sustained. Graham was prior to Carlier and Vignon in devising the "improvement in the art of extinguishing fires" embraced in this claim, and the merit of novelty cannot, therefore, be accorded to the latter.

The other claims are for mechanical combination.

Considering the second and third claims together, the intended meaning and the proper construction of the second seems to be, that it is to be limited to a combination of a strong vessel, a plug or lid, by which an orifice in it can be closed, a stop-cock, through which its contents can be ejected, and a flexible tubing or hose for directing the stream as ejected at the will of the operator, without reference to any other functions, of which any of these elements are capable, than those indicated by the terms of the claim. In other words, the claim is for a strong vessel to contain carbonic-acid and water in intermixture, with an orifice in it, a suitable plug to stop this orifice, a stop-cock to regulate the discharge of the contents of the vessel, and a flexible hose to direct the ejected contents of the vessel at the will of the operator. Thus construed, all the elements of the combination co-exist in Graham's apparatus, and are employed to perform the same functions. The claim must, therefore, be rejected for want of novelty.

The third claim, however, stands upon a different footing. It is for a combination of a strong vessel, "provided with a proper plug or lid for closing an orifice in it, and *also with a stop-cock*," with another vessel or tube; "the construction being substantially such as described, so that the vessels may keep separately the ingredients for making carbonic-acid gas, and that, when their contents are mingled, they may be discharged in a stream of carbonic-acid gas and water." The precise import of this claim will be better understood by a reference to the detailed description in the specification. The complainants' apparatus, so far as it is embraced by this claim, consists of a metallic vessel of suitable size and strength, in the top of which is an aperture and a plug to be screwed into this aperture, to which is attached a cylinder extending into the metallic vessel, and at the bottom of which also is an orifice closed by a cock; this plug has an opening for the insertion of another perforated plug which extends to the bottom of the cylinder and above the top of the metallic vessel, so as to permit the attachment

of a perforated stem leading to a pressure-gauge, with a stop-cock in it to control the operation of the pressure-gauge. The combination then consists of these elements constructed as described and adapted to perform the several functions stated in the specification, viz: 1, a vessel to hold an alkaline solution, with an orifice in its top; 2, a plug, with its complex appendages, to confine the contents of the vessel, to cause the intermixture of the ingredients for making carbonic-acid gas by removing the obstruction to their contact; 3, a stop-cock to control the discharge of the mingled contents of the vessel, and 4, a tube encased by the vessel containing the alkaline solution, and extending down into it, to retain separately a quantity of acid, until it is desired to mingle it with the contents of the enclosing vessel by opening the orifice in the bottom. This construction of the claim necessarily results from the distinct reference in it to the peculiar construction, relations, functions and arrangement of the elements of the combination, as described in the specification.

The fourth claim, if it is at all susceptible of an intelligent construction, merely adds to the combination set forth in the third, the element of a hose and nozzle.

The ninth is for a combination of a strong vessel, a lid or plug, a stop-cock near the bottom of the vessel, a hose and nozzle, and handles or loops; "whereby a volume of water charged with carbonic-acid gas may be transported and a stream thereby directed, in the manner and for the purposes described."

The tenth is for "the keeping of the acid and alkali or alkaline solution in separate and distinct vessels, but in such proximity to each other that they may be immediately brought into contact when the apparatus is required for use."

All these claims, except the last, are for combinations of devices, none of which devices are alleged to be new, and while the co-efficiency of all of them is necessary to effectuate the ulterior design of the patentees, they are subdivided into groups, and claimed as several inventions. Indeed, the specification is a notable example of ingenious multiplication of claims, so as, it must be presumed, to embrace and protect the invention in every possible aspect of it.

It is not to be doubted, however, that a valid combination may consist of old elements, which have not been before similarly arranged, or, if they have, that a novel result is produced by their conjunction. Either the instrumentalities employed, or the effect caused by their operation, must be new to constitute a patentable combination. If substantially the same devices have been used before for a like purpose, or if they are applied merely to effectuate a method known and practised before, such employment of them will not be protected by a patent.

Now applying these principles to the patent in question, I am constrained to the conclusion that the invention claimed in it is not a novel one. As before stated, its object is to render available for the extinguishment of fires, carbonic-acid gas and water in mechanical union with each other, and propelled by the elasticity of the gas. This is accomplished by means of a mechanical structure, consisting of a strong metallic vessel, containing a solution of an alkali in water; a plug or

lid fitting into an opening in the top of this vessel, with which is combined a tube extending into the alkaline solution and containing an acid suitable for evolving carbonic-acid gas, and provided with a smaller tube or rod, extending above the top and down to the bottom of the acid-chamber, by lowering which an orifice in the bottom of the acid-chamber may be opened and the acid and alkali be brought immediately into contact; a stop-cock to control the discharge of the contents of the strong vessel; a hose and nozzle to give direction to them, and handles or loops to facilitate the transportation of the apparatus.

Now the complainants cannot rest the validity of their claims for the various combinations of their elements upon the novelty of their use, and of the result produced by them, because Graham was before them in devising a method of applying the same natural agencies to the same end.

Were these elements, then, similarly combined before and used for an analogous purpose? I am convinced that an inspection and analysis of some of the defendants' exhibits, and especially of Nichols' "portable soda-water fountain," patented in 1854, must result in an affirmative answer to this question. The devices which compose the combinations claimed in the complainants' patent are substantially embodied in Nichols' apparatus, and in it they are arranged and operated in substantially the same way as in the complainants'.

The object of Nichols was to construct apparatus in which acid and an alkali could be kept in separate vessels, but in such proximity to each other that they could, at the will of the operator, be brought into immediate contact; carbonic-acid gas thereby generated, and a body of water contained in an enclosing vessel impregnated with it, and that the acidulous water could be discharged through a suitable opening by the elastic pressure of the gas and used as a beverage. The essential elements of his apparatus are, a strong metallic vessel of portable dimensions, to be filled with water, with an opening in its top; a plug to be screwed into this opening; another vessel enclosed within the strong one to contain diluted acid, and connected with it by an exterior pipe, which extends into and to the bottom of it; a tube or smaller vessel, for holding an alkali within the acid-chamber with an open bottom, which is provided with a tight-fitting lid attached to a rod, extending up through the top of the vessel, by which the bottom can be opened and closed at pleasure; and a stop-cock to permit and direct the discharge of the contents of the strong vessel in a mingled stream of carbonic-acid gas and water. To operate this apparatus, the strong metallic vessel is nearly filled with water through the opening in its top, the alkali-chamber is taken out of its place within the acid-chamber, into which latter is poured a quantity of diluted acid; an alkaline substance is put into the alkali-chamber, against the bottom of which its metal covering is tightly drawn by means of the rod attached to it, and it is then replaced and tightly screwed into the acid-chamber. By a revolution and slight pressure of the rod the bottom of the alkali-chamber is opened, and the alkali is brought into contact with the acid in the chamber below. Carbonic-acid gas is at once generated, and is conducted through the pipe provided for that purpose to the bottom of the water-vessel, where it is intermixed with the water, and from which

it is driven as desired through the discharge-pipe by the expansive force of the gas.

The primary purpose of both structures is the prompt generation of carbonic-acid gas and the impregnation of a small body of water with it. This is obviously effected in both cases by keeping the acid and alkali, in the words of the tenth claim of the complainants' patent, "in separate and distinct vessels, but in such proximity to each other that they may be immediately brought into contact when the apparatus is required for use," and by the employment of mechanical devices, which are notably similar in their construction, functions and mode of operation. And when the water is acidulated, the elastic pressure of the carbonic-acid gas is employed by both to expel it through a stop-cock, so that the structures can be interchangeably used either to supply it as a beverage or to extinguish fire. It is plain to my mind that it is only necessary to add a hose and nozzle to the discharging stop-cock in the Nichols' fountain to make it as effective a fire-extinguisher as the complainants'. It may be more cumbersome by reason of its purifying attachment, but in so far as the projection from it of a mingled stream of carbonic-acid gas and water by the elasticity of the gas is concerned, which is the ultimate function of the complainants' machine, it would undeniably operate just as effectively as the complainants'. Nor can they be distinguished by the fact that a hose and nozzle constitute part of the devices originally employed in the one and not in the other. The obvious addition of so simple an element to the devices which co-existed in the old machine, and perform all the fundamental functions of the subsequent one, cannot constitute the combination a new and patentable one.

But it is urged that the prior construction of structures of this class cannot affect the question of novelty here, because they were not applied to the extinguishment of fires, and their use and that of a fire-extinguisher are entirely diverse. It must be observed that there is a marked analogy in the means employed and the result produced by both machines up to the point of divergent application. The function of both is the prompt generation of carbonic-acid gas and the impregnation of water with it, and the same projectile force is employed to expel the acidulous water from the vessel containing it. In the one case, a stream of this water is directed into a vessel, where it may be used as a beverage, and, in the other, upon a mass of ignited matter. This difference, then, in the ultimate application of the same agencies, marks the line of distinction between them.

Now the art of extinguishing fires by means of carbonic-acid gas and water intermingled was not new, for it had previously been practised by Graham; and the real question, therefore, is, does the application of old mechanical devices, without material change, to a use in which they were not employed before, but which was known and had been practised, constitute a patentable invention? A decisive answer to this question is furnished by Mr. Justice Story in *Bean vs. Smallwood*, 2 Story, 408, where he thus states the law: "Now I take it to be clear that a machine or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well known, and applied only to a new purpose, that

does not make it patentable." And in *Curtis on Patents*, 3d ed., section 56, the result of the authorities is thus accurately stated: "Of course, if any new contrivances, combinations or arrangements are made use of, although the principal agents are well known, these contrivances, combinations or arrangements may constitute a new principle, and then the application or practice will necessarily be new also. But where there is no novelty in the preparation or arrangement of the agent employed, and the novelty professedly consists in the application of that agent, being a well-known thing, or, in other terms, where it consists in the practice only, the novelty of that practice is to be determined, according to the circumstances, by applying the test of whether the result or effect produced is a new effect, or result not produced before." It is apparent, therefore, that where an effect or result has been before produced, the mechanical agencies by which it is reproduced, if they are not in themselves new, are not the subject of a patent.

This rule is decisively applicable to the present case, both as to the result achieved and the means employed to effectuate it; and the claims for both being thus invalid for want of novelty, the bill must be dismissed with costs.

Edmund Burke, Esq., and Keller & Blake, for complainants.

Charles B. Collier and D. L. Collier, Esqs., for defendant.

[*Leg. Int.*, Vol. 31, p. 189.]

RUSSELL vs. THOMAS.

Cu. sa.—Practice—State insolvent law—Dnty of United States commissioner.

To the Honorable the Judges of the said Court:

Craig Biddle, a commissioner duly appointed by your honorable court to take bail and affidavits, respectfully represents:

That one John L. Thomas, on the 20th day of October, A. D. 1873, presented to him a petition, alleging that he was held in custody by the marshal of this district, by virtue of a *capias ad satisfaciendum* issuing out of your honorable court, to collect a debt of \$935.38, and asking that he be discharged from said custody, on giving bond to comply with the provisions of the act of Congress approved March 2, 1867, entitled "An act supplementary to the several acts of Congress, abolishing imprisonment for debt."

The said petition was granted, and a bond given to the plaintiff in the suit by the petitioner, for his appearance before your commissioner to apply for his discharge under the provisions of the insolvent laws of the State of Pennsylvania.

In accordance with the condition of his said bond, the petitioner presented himself on January 19, 1874, at 11 A. M., before your commissioner, accompanied by his counsel, Mr. Sellers, filed proof of the publication of the notice required, and asked that the final hearing be proceeded with.

Mr. Sharpless, for W. D. Russell, the plaintiff, on whose execution the petitioner was in custody at the time of the filing of the original petition, moved the commissioner to decline to take further jurisdiction in the case, on the ground that the act of Congress, already referred to, is

unconstitutional and void in this, that it attempts to confer the judicial power of the United States upon a judicial officer holding his office by other tenure than that of good behavior.

Mr. Sellers requests, in view of this objection, that the further hearing of the case be postponed until Monday, February 2, 1874, at 11 A. M., and that the proceedings be reported to the Circuit Court, for such instructions as they may decree meet.

Your commissioner, therefore, in accordance with said request, hereby submits the question to your honorable court for its decision thereon.

All of which is respectfully submitted by your commissioner.

January 20, 1874.

CRAIG BIDDLE.

BY THE COURT. January 31, 1874.

Capias ad satisfaciendum.

On defendant's petition for liberation and commissioner's report thereon.

The question certified arises upon the concluding words of the act of Congress, of 21 March, 1867, supplementary to the several former acts abolishing imprisonment for debt. The former acts to be considered are not only those of 28th February, 1839, and 14th January, 1841, "to abolish imprisonment for debt in certain cases," but also those of 6th January, 1800, and 7th January, 1824, "for the relief of persons imprisoned for debt." Those acts of 1800 and 1824 made certain functions exercisable by commissioners of insolvency specially appointed for each case in which relief might be affordable. The intervening acts of 1839 and 1841 contain no such express provision. But their execution might have required the occasional intervention of such specially appointed commissioners. The words in question at foot of the supplementary act of 1867 are, "But all such proceedings shall be had before some one of the commissioners appointed by the United States Circuit Court, to take bail and affidavits."

The objection certified, assuming that these words confer an independent judicial function upon such a commissioner, is that Congress cannot constitutionally make such a function exercisable by any officer who is not appointed by the President with the consent of the Senate. If the objection would otherwise prevail, the assumed construction of the words must, for that very reason, be rejected, and they must be understood as having a constitutional meaning and application. They might then reasonably be understood as importing that wherever proceedings before a commissioner, under this supplementary act of 1867, or any former act, should thereafter be necessary or otherwise proper, they should be had before one of the standing commissioners. Legislative precedents for such an enactment might be mentioned. One of them occurred under the bankrupt law of 1800. By that act, § 2, commissioners of bankruptcy had been specially appointable, for every case, by the judge. The act of 29th April, 1802, to amend the judicial system, § 14, substituted general commissioners appointable by the President, without requiring any consent of the Senate.

It may be suggested that if such were the true and only application of the words in question, the present proceedings ought to have been

commenced by a petition to the court, or to a judge; and that the reference to one of the standing commissioners, if proper, ought to have followed. In future this will probably be considered the more convenient course in ordinary cases. The present certificate of the commissioners having been made at the debtor's instance, may be so acted upon by the court as to be of equivalent effect to an initial petition, and a reference under it.

But there may perhaps be extraordinary cases in which the exclusion of a standing commissioner's initial cognizance of the application for relief, would prevent seasonable liberation of a prisoner. We may, therefore, consider whether the constitutional question which has been suggested could then properly arise.

That Congress may vest the appointment of such an inferior judicial officer as the commissioner in the President alone, or in the court alone, is, under the second section of the second article of the Constitution, indisputable, and is not here disputed. The objection is, that the function here in question is an independent one, beyond the pale of an inferior officer's authority. But it is observable that the function is merely incidental to the execution of final judicial process. It is not necessary, however, to inquire whether Congress could make such a function exercisable independently of revision by the tribunal which issues the process, because under these acts of Congress, the commissioner's proceedings are, at every stage of them, amenable to such revision.

His relation of a subordinate or inferior judicial functionary, if he proceeds without special preliminary authorization, may, perhaps, warrant summary revision by the court on affidavit, showing that his proceedings are unwarranted or irregular. If this be otherwise, it follows that there may be revision through process of habeas corpus, or certiorari, if not by both.

The jurisdiction of the court having already attached under the judgment and execution, the power to issue revisory and auxiliary process by habeas corpus or certiorari, is conferred by the 14th section of the judiciary act of September 24, 1789. This enactment expressly names the former of these writs; and the latter is included in the words, "all other writs not specially provided for by statute which may be necessary for the exercise of" the "respective jurisdictions and agreeable to the principles and usages of law." The point as to a certiorari to enforce revision has been considered in another circuit; and has, in principle, been decided by the Supreme Court in the case of a mandamus. The Circuit Court has no original jurisdiction to issue a mandamus, and it is not named in the 14th section. But the decisions are, that it is, nevertheless, one of those other writs, which in aid and furtherance of an execution, may, under that section, be issued by the Circuit Court.

In the present case, it will suffice to make an order directing the commissioner to proceed in like manner as if the petition had been presented in the first instance to the court, and had been afterwards referred to him for provisional action, subject to exception, etc.; provided that the petitioner's right of liberation, and every incidental and other question shall be open to consideration, and that either party may apply to the court for directions, etc.

The nature of this proceeding would be misconceived if it were under-

stood as affecting any other party than the execution creditor, or as depriving him of any recourse against the debtor, except that of imprisonment. No federal court can interfere with any independent process of a State court. Nor can a State court interfere with the execution of judicial or other process of a federal court. A discharge by the insolvent court of a State, therefore, has no force or effect of its own to liberate the insolvent from custody, under mesne or judicial process of this court against his body. But under acts of Congress, ordinarily called the process acts, which have not been as yet cited, a rule of practice of a court of the United States that "under neither mesne nor final process, shall any individual be kept in prison who, under the insolvent law of the State, has, for such demand, been released from imprisonment," was valid. This was not generally understood until the decision of *Beers vs. Haughton*, 9 Peters, 329, in the year 1835. Such a rule of practice was afterward adopted in the courts of the United States in most of the judicial districts, including those of Pennsylvania; and it was the purpose of some of the subsequent acts of Congress which have been cited to facilitate such discharge from imprisonment. It thus became the practice in this court to discharge a prisoner, as in the State courts, on his giving a bond with the usual condition to take the benefit of the insolvent law of the State at the next term, etc.

This insolvent law of the State authorizes the discharge of an insolvent debtor, on different conditions, in three different cases; the first where he is arrested or detained under process in any civil suit or proceeding for the recovery of money or damages, or for the non-performance of any decree or sentence for the payment of money; the second, where he is held on a bail-piece; the third where he is not arrested, detained, or held in custody in any manner. A person arrested or detained in a civil suit, under mesne or final process of this court, or under a bail-piece issued in any suit in this court, cannot obtain his liberation from such custody by a proceeding of either the first or the second kind in a State court of insolvency. Nor in a proceeding of the third kind, will the State courts have cognizance of any ulterior purpose of such a party to make the discharge, when obtained, available for his liberation in this court. The present petitioner is reported to have proceeded in the insolvent court of the State to obtain, not a general discharge in the third of these modes, but a special discharge from the process of this court in the first mode. Of course he failed to induce the exercise of such a jurisdiction: Leg. Int., October 24, 1873, vol. 30, p. 344.

Whether his present application is rightly conceived, and if not, whether the mistake will prevent him from obtaining relief under a simpler view of the legislation of Congress which may be applicable, are questions for preliminary consideration and provisional decision by the commissioner. One of the questions may possibly be whether the provision of the law of the State that a prisoner, such as this defendant, who was in custody under process upon a judgment in an action for deceit, shall not be discharged until after an actual confinement of sixty days, qualifies the right of liberation which would otherwise be available to him under the acts of Congress of 1800 and 1824. If the right is thus qualified, it must be through the effect of the acts of 1839, 1841 and

1867. These laws were enacted in the spirit of the decision of *Beers vs. Houghton*, with a general purpose to enlarge exemption and facilitate discharge from imprisonment. It is true, that in extending the relief to the full extent of that affordable under the laws of the respective States, these acts of Congress require observance of the respective State laws, and expressly provide that all existing modifications, conditions and restrictions upon imprisonment for debt under the laws of any State, shall be applicable to process of the courts of the United States therein, etc. But the question to be considered will be, whether these requirements and conditions are not limited to the cases in which this adoption of State laws by Congress gave exemption or relief not otherwise obtainable under any positive law of the United States; and, therefore, whether the positive enactments of 1800 and 1824 in favor of personal liberty, are impliedly repealed or qualified by the subsequent statutes. I do not mean to intimate any present opinion as to their operation in these respects.

The act of 1867 was passed on the same day as the present bankrupt law. The insolvent laws of the several States variously differed from one another, and provisions of some of them could not co-exist with the bankrupt law. But I do not perceive that the act in question is interpretable, in anywise, with reference to the bankrupt law. Nor do I perceive any important bearing, positive or negative, of any of the provisions of the 5th, 6th or 14th sections of the act of June 1, 1872, "to further the administration of justice," though the general purpose of its 5th section is to promote conformity in the practice and modes of proceeding in the State and the federal courts. But here again what I suggest will not preclude future argument.

I make the suggestions because their subjects were more or less fully argued on the application of the execution creditor for a writ of prohibition to the commissioner, and because they serve to explain my reasons for not granting that writ.

Western District of Pennsylvania.

[Leg. Int., Vol. 31, p. 197.]

GEORGE C. K. ZAHM, Assignee, etc., vs. SAMUEL A. FRY *et al.*

Confession of judgment, and execution under it, where it must necessarily stop the debtor's business, is a void transfer and preference within the meaning of the bankrupt act, as of the date of the entry of judgment.

The court can decree a restoration to the assignee of the fund realized, although it may be in the custody of a State officer.

Without actual fraud a creditor so preferred will be allowed, upon surrender, to participate in the bankrupt's assets.

Appeal from the decree of the District Court, dismissing the complainant's bill. Opinion delivered May 11, 1874, by

MCKENNAN, C. J.—Creditors' petitions were filed in the District Court on the 7th of September, 1870, against A. C. Fry, and Fry, Duer & Co., who were merchants and traders, and were so proceeded in that they were duly adjudicated bankrupts, and the complainant was appointed their assignee. On the 18th of August, 1870, judgments were entered in the Court of Common Pleas of Cambria county on warrants of attorney, in favor of the respondents severally, except Weiser, Cress-

well and Keith, executions were issued and levied upon the stock in trade of the bankrupts and their business was stopped. The bill seeks to avoid these judgments as fraudulent under the bankrupt act, and to obtain a transfer of the fund produced by the executions to the complainant.

By the 35th section of the bankrupt act, any transfer, direct or indirect, of any part of his property by an insolvent debtor to a creditor who has reasonable cause to believe that he is insolvent, and that such transfer is made in fraud of the provisions of the act, is declared to be void, and the assignee is empowered to recover the property or the value of it, from the person receiving it or to be benefited by its transfer. Under this section, it was held by this court, after careful consideration, in *Hood vs. Karper*, 28 Leg. Int. 340; S. C. 5 N. B. R. 358, that the confession of a judgment, the issuing of an execution, and a seizure and sale of property under it, constituted an indirect transfer of such property by the debtor. In the same case it was also held that the objectionable transfer and preference were to be considered as made and obtained *when the warrant of attorney was executed by the entry of the judgment*, irrespective of the date of the warrant; and that where an execution must necessarily stop the debtor's business, the creditor, in general, has reason to believe the debtor to be insolvent, and must be considered as intending what, if not prevented, would be a fraud on the provisions of the act.

The co-existence of these elements of illegality in the judgments complained of is clearly established by the proofs in the present case. At the time of their entry, the bankrupts were insolvent, within any definition of insolvency, the judgments were entered upon warrants of attorney a few days before the institution of bankruptcy proceedings, executions were contemporaneously issued upon them, which were levied upon all the available assets of the bankrupts, and their business was at once entirely broken up. There is no room for doubt, therefore, that these judgments are impressed with all the attributes of fraudulent preferences as the bankrupt law defines them.

Nor, as was urged at the argument, is this conclusion inconsistent with the decision of the Supreme Court in *Wilson vs. The City Bank*, 17 Wall. 473. In that case the creditor's judgment was obtained without the aid or co-operation, direct or collusive, of the bankrupt, and so was strictly adverse. The resulting preference lacked the essential element of promotion by the bankrupt to infect it with the taint of fraud. The court, therefore, held that the mere failure of the debtor to file a petition in bankruptcy to prevent the judgment and levy was not sufficient evidence of an intent to give a preference, or to defeat the operation of the bankrupt law. But in this case the attitude of the debtors was not passive. The judgments against them were obtained by their own act, because what was done by another by their express authority was done by them, and the preference thereby secured by the creditors is conclusively presumed to have been the intended consequence of that act. There is, then, as broad a distinction between the cases as there is between *bona fide* passiveness on the part of an insolvent debtor in an adverse proceeding, which is not an element of fraud, and positive promotion of an objectionable preference, which is.

It was insisted, however, that this court cannot take cognizance of the complaint, because the fund produced by the sale of the bankrupts' property under the judgments and executions sought to be avoided is in the custody of a State officer, and is subject to distribution under the direction of a State court.

The bankrupt law provides the necessary machinery for its complete administration. Ample jurisdiction, in law and equity, is conferred upon the federal courts to fulfil all its exigencies. Indeed, the efficient, successful and uniform operation of the system depends upon the adequacy of the means provided for its execution and their prompt availability, as occasion may require. Certainly it was not made dependent upon the optional exercise, by independent tribunals, of the jurisdiction which it confers. While the State courts may exercise concurrent jurisdiction with the federal courts in certain cases arising out of proceedings in bankruptcy, they are not bound to do so. The latter alone are the appointed instrumentalities for the execution of the law, and their duty to do it is imperative. A federal court was, therefore, the appropriate tribunal to resort to for the relief sought in the present case. The complainant might have resorted to the State court, but he was not bound to do so. He is necessarily the actor, and until he invoked its cognizance, and it thus acquired jurisdiction over the parties and the subject-matter of the cause, no rule of comity even is violated by an appeal to the federal tribunal expressly constituted for the adjudication of his complaint.

In the unquestionable and necessary exercise of the power conferred by the bankrupt law, it is the practice of the federal courts to inquire into the validity of judgments entered in the State courts, to restrain their enforcement by execution, and, if adjudged to be fraudulent under the act, to set them aside and decree the transfer of the property seized in execution under them, or the proceeds of its sale to the bankruptcy assignee. Even where such proceeds have been received under the order of a State court, by a creditor obtaining a fraudulent preference, the value of the property sold or appropriated has been adjudged to the assignee. And this is not only expressly authorized by the bankrupt act, but has been decided by the Supreme Court in *Shawhan vs. Wherritt*, 7 How. 627, to be a proper method, under the analogous provisions of the bankrupt act of 1841. In this circuit, the equitable remedies to effectuate these results have been allowed only against the beneficiaries of illegal preferences and transfers of the bankrupt's property. Possibly a too fastidious interpretation of the act of Congress forbidding injunctions against proceedings in State courts has induced the exemption of the executive officers of these courts from these remedies. But in some other circuits, at least, this immunity is not accorded. In the second circuit similar bills to the one in this case are entertained against sheriffs, and in answer to an objection that the authority of the State courts was thereby interfered with, the able judge of that circuit, Mr. Justice Woodruff, said: "On behalf of the sheriff, it is insisted that he is an officer of the State court, and held the property by virtue of their mandate, and that this is an interference with the authority and jurisdiction of the State courts, and therefore the sheriff ought not to be made a party. There is nothing in this. The proceeding no more interferes with him or with the State courts than would an action of trover or replevin

where he levies upon and retains property which he has no right to apply to pay an execution. He is made a party for his own protection and because he holds the subject of the controversy. No decree is sought and none should be made affecting him otherwise than as the custodian of the fund, and to secure the control of the court over it. He has in no other sense any personal interest in the controversy, and ought not to be prejudiced in any manner by the decree." But if only the parties beneficially implicated in the objectionable transfers are to be affected by the decree, there is even less reason for the suggestion that there is any encroachment upon the rightful province of the State courts.

There was, however, no question of which the State court had assumed cognizance, which this bill seeks to withdraw from it. Pending the levy under the judgments complained of, proceedings in bankruptcy were commenced against the defendants in them. Upon the finding of a jury on an issue demanded by them, they were adjudged bankrupts, and the present suit was thereupon instituted. The property seized by the sheriff was sold, and the proceeds are in his custody without any movement for their distribution having been made in the State court when this bill was filed. As a distribution of the fund by that court, without the intervention of the complainant, would not affect his right to recover it from those to whom its payment might be decreed, and as he alone could contest the validity of the judgments as fraudulent preferences, the State court had not acquired a jurisdiction of the parties, which would preclude him from resorting to another tribunal invested with full power to decree and enforce the relief to which he might be entitled. There is, therefore, no reason of comity why the complaint should not be entertained; on the contrary, obvious considerations touching the prompt and complete adjustment of the equities of the parties and the speedy administration of the bankrupt's estate require that it should be entertained.

The transfer of the book accounts to John A. Weiser is clearly unsustainable. It was made after executions had been issued against the bankrupts to a large amount, when their business was stopped and their insolvency manifest, and avowedly to give Weiser a preferential security for his claim against them.

The supplemental bill against Thomas H. Cresswell and Susan Keith stands upon a different footing. Susan Keith is the *bona fide* alienee of Cresswell of a small piece of land purchased by him at sheriff's sale as the property of the bankrupts, under a judgment entered on the day of, but presumably under the proofs, before the filing of the petition in bankruptcy. This judgment and the process issued upon it were not void, but only voidable in the bankruptcy court. Although Cresswell had constructive notice of the bankruptcy proceeding, yet the judgment under which he purchased was apparently a valid lien under the State law upon the property, and he had no notice of any infirmity in it. Its subsequent avoidance, as a fraudulent preference, by the consent of the plaintiff in it, in a proceeding to which Cresswell was not a party at the time, can have no effect upon his title. He, therefore, occupies the position of a *bona fide* purchaser for value, without notice of the invalidity of the judgment, and the bill as against him and Susan Keith must be dismissed.

No *actual* fraud is imputable to any of the other respondents, and they ought not to be subjected to the harsh penalty of exclusion from participation in the assets of the bankrupts, which would result from a final decree against them. They should be allowed the choice of the only alternative of escape from it.

If, therefore, within thirty days the holders of the objectionable judgments, respondents in the bill, cause the fund produced by their executions with any interest which may have accrued from its use, to be turned over to the complainant, less the sheriff's commission and costs of sale; if John A. Weiser account for and pay to the complainant the amount of the book accounts collected by or for him, and transfer to the complainant all the accounts remaining unpaid, deducting any sum or sums paid by him for collection; and if all these respondents deliver a writing to the complainant surrendering their alleged liens or preferences, and agreeing that the costs of this suit, together with a reasonable compensation to the complainant's solicitor, to be fixed by agreement of the parties or the allowance of this court, may be deducted from their dividends of the bankrupt's assets, no final decree will be entered in this case, and they will be allowed to prove their debts before the register.

George M. Reade, Esq., solicitor for complainant.

R. L. Johnson, W. D. Moore and F. A. Shoemaker, Esqs., solicitors for respondents.

Western District of Pennsylvania.—In Bankruptcy.

[Leg. Int., Vol. 31, p. 316.]

EDWIN L. PIPER, Assignee of LEVI BERGER, vs. EDWARD H. BALDY.

Judgment notes given *bona fide*, and for an amount actually received, will not be set aside merely because they were entered a month before a petition in bankruptcy was filed against the defendant. Some of the notes were dated three and four years before the petition was filed.

Opinion delivered June 9, 1874, by

STRONG, J.—The object of this bill is to set aside eleven judgments obtained by Edward H. Baldy, the defendant, against Levi Berger, who has been adjudged bankrupt, and the relief asked is based upon the averment that the judgments were entered in fraud of the bankrupt law. There is very little controversy in regard to the facts. It appears by the evidence, as well as by the pleadings, that the bankrupt, for several years prior to his bankruptcy, carried on business as a builder and lumberman at Danville, in the county of Montour, and in addition to this he was the lessee of a planing mill in the city of Williamsport during part of the years 1873 and 1874. He bought and sold lumber, and ran a planing mill at Danville; also at various times during the years he was thus in business he borrowed from Baldy, the defendant, different sums of money, giving at the time each loan was made a bill single for the sum borrowed, containing a confession of judgment for the debt and interest. The first of these bills was dated April 6, 1869. Three others were given in the same year, five others in the year 1870,

one in 1872, and the last, February 6, 1873. Though each of them contained a confession of judgment, no judgment was entered on the record of the Court of Common Pleas until June 26, 1873, thirty-three days before Berger was adjudged a bankrupt. When the petition was filed does not appear. Then the judgments were entered in the Common Pleas, at the instance of Baldy, without any agency of the debtor, so far as it appears, and without his knowledge. The entry was made in virtue of an act of the State Legislature, enacted February 24, 1806, which empowers the prothonotary of any court of record, on the application of any person, being the original holder (or assignee of such holder) of a note, bond or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same without the agency of an attorney or declaration filed.

Such are the circumstances preceding and attending the entry of the judgments, so far as it is now necessary to state them, and the question to be answered is whether they exhibit a case which would justify me in declaring that the judgments were entered in violation of the letter or spirit of the bankrupt act; and clearly if they were, it must be because of the provisions of the 35th section of that act. Those provisions are, that "if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge or assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void." I think it quite clear this provision has reference to payments, pledges, assignments, transfers, conveyances or attachments made to satisfy or secure an antecedently existing debt or liability, and not to debts incurred, for which a full consideration was received by the debtor when he gave the pledge or transfer, etc. In the latter cases nothing is withdrawn from the general creditors. The man who borrows money, and gives at the time of the loan a security for the repayment, does no act which can be hurtful to others having claims upon him; and I cannot think the bankrupt act intended to make such a transaction unlawful; so it has been substantially decided in *Tiffany vs. Boatman's Saving Institution*, a case recently ruled in the Supreme Court, but not yet reported. There it was said "the preference at which the law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and therefore the debtor and creditor are alike prohibited from giving or receiving any security for a debt already incurred, if the creditor has good reason to believe the debtor to be insolvent. But the giving of securities *when* the debt is

created is not within the law ; and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid."

It is unnecessary to quote the other clause of the 35th section of the act, known as the six months' clause, for it is not claimed, nor indeed could it be, that the present case is affected by it.

Now it is to be observed that all the loans made by the defendant to the bankrupt except one, and all the confessions of judgment except one, were made more than nine months prior to the adjudication of bankruptcy. The exception is of the loan and confession dated February 6, 1873. The confessions of judgment were all given to secure debts contracted at the time they were given—loans then made to the debtor. It is true the entries of the judgments on the records of the Court of Common Pleas were not made until June 26, 1873. Those entries, however, were not acts of the bankrupt. When they were made he was neither a party nor a privy to them in any such sense, I think, as to render them fraudulent because of collusion with his creditors. To avoid judgments obtained for debts of a bankrupt, under the clause of the 35th section of the bankrupt act quoted, it is necessary that several things should appear. Not only must the debtor have been insolvent, or contemplating insolvency, but he must have given the judgment, or procured it to be given, within four months before the filing of the petition by or against him, *with a view to give a preference*, and the creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment was given in fraud of the provisions of the act. It seems to me quite evident that the *view* or intent to give a preference contemplated by the act must be an intent existing in the mind of the debtor when the preference is attempted, that is, in case of a judgment when the judgment is entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him when he is ignorant of the fact that a judgment is being obtained? That he may years before have contemplated the possibility that a judgment might hereafter be obtained against him ; that years before he may have given a warrant of attorney to confess a judgment, or by his own confession, as in this case, have put it in the power of his creditor to obtain a judgment, is, in my opinion, wholly unimportant to the inquiry, whether he had in view an unlawful preference within four months next prior to his bankruptcy? For it is a fraudulent intent existing within those four months which the act of Congress has in view. I cannot, therefore, assent to the doctrine which is said to have been recognized in some cases, that if a debtor has given a bond with a warrant of attorney to confess a judgment, and afterwards, within four months prior to the filing of a petition in bankruptcy, by or against him, a judgment is entered by virtue of the warrant, he must be regarded as having given the judgment, having in view at the time of its entry a preference for the judgment creditor. I agree that such a confession by his attorney is in contemplation of law his act, but I deny that it warrants any inference of an intended fraud on the bankrupt law. The present, however, is not such a case. The judgments were not entered by virtue of any warrant of attorney. They were confessed by the debtor when the loans were made, and the subsequent

entries of record were made not by authority of the bankrupt but under the sanction of an act of assembly. Neither directly nor indirectly, therefore, was any act done by the bankrupt within four months next prior to his bankruptcy evidence of an intent to give a preference. For this reason, then, if for no other, I must hold there is no evidence before me that Berger had in view, on the 26th of June, 1873, when the eleven judgments were entered of record in the Common Pleas, a preference of Baldy over other creditors, hence the case is not covered by the 35th section of the act of Congress.

Nor do I think there is any satisfactory evidence that the defendant either knew or had reasonable cause to believe that Berger was insolvent at the time the judgments were entered of record, or at any time prior to the entry, that Berger was insolvent in June, 1873, because quite manifest afterwards. But I do not discover any reason Baldy had for suspecting his solvency until after the judgment sworn entered; none, indeed, until later judgments in favor of others were recorded. Berger was carrying on his business as usual, and that business was very large, amounting, as the proof is, to \$200,000 between July, 1872, and July, 1873; there is no evidence that his entire solvency was doubted by any one until after the Baldy judgments were put on record. The Danville Bank continued to discount for him large amounts of his business paper until after July 1, 1873; and the bank in Danville did likewise, and in addition gave him accommodation discounts; and that Baldy knew or even suspected he was insolvent is incredible in view of the facts that he suffered the judgments to remain unentered so long, and did not cause executions to be issued after they were entered, though the greater part of the debtor's property was personalty, and his real estate was greatly insufficient to satisfy the debt. No doubt the effect of the entry of the judgments was to precipitate Berger's failure and the stoppage of his business. But I have sought in vain for any evidence of apparent or probable insolvency before the entry. It has been argued that the loans were part due, and that this should have awakened suspicion in the defendant's mind. It would have some importance if the loans were evidenced by commercial paper, but I regard it as of no significance in view of the well-known habits of business in the interior of Pennsylvania.

It is contended also, that the defendant was the attorney of the bankrupt; he had made some collections for him, a very few, and had drafted some mortgages and agreements, but it does not appear that he was a confidential adviser at all, certainly not to such an extent as to warrant the conclusion that he must have known or might have known the debtor's pecuniary condition or the extent of his resources and liabilities, before the whole, therefore, without regard to anything contained in the act of June 22, 1874, amendatory of the general bankrupt act. I should be of opinion no case has been presented to justify my holding any of the eleven judgments of the defendant against the bankrupt to be invalid. But the amendatory act, it appears to me, relieves the case from all possibility of debate. Its 11th section enacts that "nothing in the 35th section of the general act shall be construed to invalidate any loan of actual value, or the security therefore made in good faith upon a security taken in good faith on the occasion of the making of such

loan." It is conceded the loans of money made by the defendant were made in good faith, and that the confessions of judgment in the bills single were taken in good faith where the loans were made. Beyond doubt, these confessions authorized the entry of the judgments at the time they were entered of record, unless the authority was invalidated by the 35th section of the bankrupt act, and that it was not, the amendment determines.

The bill must therefore be dismissed with costs.

Eastern District of Pennsylvania.—In Equity.

[Leg. Int., Vol. 31, p. 254.]

ADJUSTABLE WINDOW SCREEN COMPANY vs. BOUGHTON.

Under cover of securing his own invention, a patentee cannot expand his claim so as to embrace the invention of another; the consequence of such an attempt is to imperil his title to the product of his own mechanical skill.

Opinion delivered *June 12, 1874*, by

MCKENNAN, C. J.—The complainant's bill is founded upon letters patent reissued to it as assignee of Abner B. Magoun, for an adjustable window-screen. "The nature of the said invention consists of an adjustable window-screen, composed of two or more frames, each frame being covered with wire or other gauze, and sliding within guides attached to either or both of the frames, being so constructed that each screen when completed can be immediately adjusted to windows of various widths without altering the screen, viz., without adding to or detaching anything from it."

The novel merit of this screen consists in its adjustability to windows of various widths after the gauze is attached to it. This is the only essential difference between it and the mosquito frame, patented by Lewis S. Thompson, on the 24th February, 1863, three years before the date of Magoun's patent.

Thompson's frame must first be fitted to the opening intended to be covered, and a netting of suitable width then attached to it. In Magoun's, however, this separate adjustment of the frame and netting is avoided, by its being composed of two frames covered with gauze, held together by a metallic guide, and by sliding them in or out, laterally, it may be fitted to the width of any opening.

But the adaptability of both screens to the purpose for which they are to be used is due to the adjustability of their frames. The frames must be and are capable of extension and contraction to fit them to openings of varying widths. This capability, therefore, is a fundamental condition of both inventions.

Now Thompson was the first inventor of an adjustable frame for a window-screen, and I think the frame forming the basis of Magoun's invention cannot be distinguished from it in the principle of its construction or the mode of its operation. Obviously similar mechanical appliances—metallic clips or guides—are used in both to secure the same results, and they are alike adapted to the openings to which they are to be applied by extending or contracting them in the guides. It is true, that Magoun's screen is composed of two separate frames, but this

is only a formal difference. Their conjunction is indispensable to the completeness of the screen, and when united in the guides they are adjusted in the same mode in which Thompson's frame is. Nor does this form of construction secure a different or more effective mode of adjustment of the frame. Its evident and only object is to effect the adjustability of the netting, so that, by its attachment to separate frames sliding past each other in the same guide, it is adaptable to any opening to which the combined frame is fitted. In this respect it is an improvement upon Thompson's invention; but the use of the latter is indispensable to its efficiency, and is the essential basis of it.

By properly limiting his application, Magoun might have been entitled to a patent for this improvement, but he could not appropriate what he did not invent. Under cover of securing his own invention, he cannot expand his claim to embrace the invention of another. The consequence of such an attempt is to imperil his title to the product of his own mechanical skill.

The reissued patent claims a window-screen, the only apparent difference between which and Thompson's, aside from the improvement referred to, is in its being composed of two separate frames. This, as before stated, is a formal and not a substantial difference; it is broad enough to comprehend Thompson's prior invention, and upon such a footing it cannot be sustained.

The bill must, therefore, be dismissed with costs.

Western District of Pennsylvania.—In Equity.

[Leg. Int., Vol. 31, p. 324.]

THE LOCOMOTIVE ENGINE SAFETY TRUCK COMPANY vs. THE PENNSYLVANIA RAILROAD COMPANY.

1. The patent of the Locomotive Engine Safety Truck Company is not invalid for want of novelty in the invention, for, when in combination with a locomotive engine, it is substantially a different truck from any other in use. This combination is a patentable invention.
2. The mere forbearance to apply for a patent during the progress of experiments, and until the party had perfected his invention and tested its value by actual practice, affords no just ground for presuming an abandonment.

Opinion delivered *October 1, 1874*, by

STRONG, J.—It is indispensable at the outset of this case to have a clear apprehension of the device or improvement for which the patent was granted to Alba F. Smith, the patent, which, it is alleged, the defendants have infringed. The invention is denominated by the patentee in his specification, "an improvement in trucks for locomotive engines," and in the description of the drawing, he calls it a plan of his truck. His language is: "In the drawing I have represented *my* improved truck itself. The mode of applying the same to any ordinary locomotive engine will be apparent to any competent mechanic, as *my* truck can be fitted in the place of those already constructed, or the same may be altered to include *my* improvement." But though this seems to indicate, that in the mind of the patentee, the thing invented by him, or at least the principal thing, was an improvement in the trucks, the state of the art when his alleged invention was made, as well as other parts of

his specification, and his claim, make it quite clear that the patent must be construed as embracing nothing more than a combination, or in other words, the employment in a locomotive engine of a truck for pilot wheels, framed in the manner described, and capable of a specified operation. That constituent of the combination called a truck is particularly defined. Its peculiarities are pointed out, and thereby it is distinguished from other trucks, which might have been, and some of which had been, used in locomotive engines. But the truck so described was an old device, I think, well known, and in common use long before the Smith patent was granted. This has been established, in my opinion, beyond doubt, by the evidence relative to the state of the art.

In 1841 a patent was granted to Davenport & Bridges for an improvement in railway carriages, especially eight wheel carriages, having two trucks, one at each end of the car, and each truck connecting a set of four wheels. The improvement consisted mainly in constructing each truck with a swinging bolster located centrally between the axles. Upon this bolster the car rested, and was connected with it by a king-bolt passing through its centre. The bolster was sustained by pendant links, at or near each end of it, suspended upon two iron bars, resting on the truck frame, and having their lower extremities connected. The links and the bolster sustained by them were thus allowed to swing transversely to the track, limited, however, in the extent of their play, by springs set in each side of the king-bolt at a suitable distance from it. The objects and effects of this device were to allow, in addition to free rotation of the truck around the king-bolt, a lateral movement of the truck under the car, when running upon, into, or out of a curved track, or at other times, and also to relieve passengers in the cars from the sudden jars caused by the sideway movement of the flanges of the wheels against the track rails. This improved truck appears to have been applied extensively to eight wheel cars, generally, if not always, at each end of the car. It was, however, said in the specification of the patentees, that one of the truck frames of such a car (an eight wheel) might have their invention applied to it, but that when applied to two of them at opposite ends of the car, there was a combined action of the two which tended to straighten the line of draft in a train of cars when running on a curve of the railway.

It does not appear that any truck exactly like that described in the Davenport & Bridges patent was ever applied to a locomotive engine, or any car, in which the driving or hindmost wheels are rigidly attached to the body of the car or engine, and are incapable of rotating under the body. Nor was the truck, in all respects, like the truck employed in the Smith combination, though it made a near approach to it. It was not essential to it that the pendant links should be divergent. But the truck was so constructed as to allow lateral motion and swiveling on the king-bolt, and in the improvement subsequently made by Kipple & Bullock, for which a patent was granted to them on the 20th of December, 1859, divergency of the links was an essential part. In that improvement, while the swinging bolster and the pendant links were employed as in the Davenport & Bridges invention, the side springs were dispensed with, and the links were constructed so as to diverge outwards from the bars on which they were suspended. The links were thus

fitted to restrain the lateral movement of the bolster, and correspondingly of the car resting upon it, whether the tendency was to move towards the right or the left, and to keep the car within the limits of the space over which the links were allowed to vibrate. The use of divergent links had also a tendency to bring back the superincumbent car to a central position between the wheels, for, as one of the links became more inclined, the other necessarily assumed a more vertical position, thereby raising the end of the bolster next the outer rail of the track. Thus the car resting on the bolster was compelled by any lateral movement of the truck to move up an inclined plane in a direction opposite to the lateral motion, and consequently its weight was ever forcing it downwards towards the central line between the rails. This improved truck was undoubtedly the same in all essential particulars as that employed by Smith in his combination.

I think also it has been proved in this case that pilot trucks having beams or bolsters, swinging on links spread at the base, so that the lower ends pointed outwards, and swiveling on the centre king-bolt, had been made and used before even the Kipple & Bullock invention. They appear to have been used on both the Vermont Central Railroad and the New York and New Haven Railroad, before May, 1852, and on the Connecticut River Railroad as early as July, 1856. It is, therefore, very evident that there is nothing in the truck employed by Smith that was originally invented by him, nothing for which a patent could have been legally granted to him. But if there were, neither the truck as such, nor any improvement in it, is claimed in his specification, as his invention. It is in effect disclaimed. Though he calls it *his* truck, and *his* improvement, evidently he means the truck, or improvement which he uses in his combination. His language is, "several laterally moving trucks have heretofore been made and applied to railroad cars. My invention does not relate broadly to such laterally moving trucks, but my said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels provided with pendant links to allow of a lateral movement, so that the driving wheels of a locomotive engine continue to move correctly on a curved track, in consequence of the lateral movement allowed by said pendant links, the forward part of the engine travelling on a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of the curve." Such, also, almost "*in totidem verbis*," is the language of the only claim made. It is true, the specification describes minutely the truck which the patentee calls his, with its swinging bolster, diverging pendant links, and with its centre and elongated opening for the king-bolt, but in view of the other parts of the specification the description must be regarded as merely an identification of the peculiar truck which he proposes to employ in combination with a locomotive engine.

It must then be concluded, in view of the history of the art, and of the specification itself, that the invention patented to Smith was not a pilot truck having an improved construction, nor any improvement in a truck. Nor was it, I think, merely a combination of a truck with a locomotive engine, even though the truck should be capable of lateral movement; but it was the combination with or the employment in such an engine of a truck fitted with divergent pendant links to allow lateral

motion, and having the properties and capacities of the peculiar truck described in the specification. Capability of lateral motion obtained through the agency of a swinging bolster and pendant links, or some equivalent therefor, was undoubtedly essential to the truck, but I think this was not all that was essential. The different devices described were intended to accomplish a purpose, which was declared to be to allow the drivers of the engine to remain correctly on the track in consequence of the lateral motion of the truck, allowed for by the pendant links when running on a curve, as set forth. This is a part of the language of the claim, and in describing the operation of his improvement, the patentee says: "When running upon a straight road the engine preserves great steadiness, because any change of position transversely of the track, in consequence of the engines moving over the track, or the truck beneath the engine, is checked by the weight of the engine hanging upon the links (o o), and in consequence of their divergence any side movement causes the links on the side towards which the movement occurs to assume a more inclined position, while the other links come vertical, or nearly so; hence the weight of the engine acts with a leverage upon the most inclined links to bring them into the same angle as the others, greatly promoting the steadiness of the engine in running on a straight line. As the pilot or truck wheels enter a curve, a sidewise movement is given to the truck in consequence of the engine and drivers continuing to travel as a tangent to the curve of track; this movement *and the slight turn of the whole truck on the king-bolt* (i) not only causes the truck wheels to travel correctly on the track with their axles parallel to the radial line of the curve of the track, but also elevates the outer side of the engine, preventing any tendency to run off the track upon the outer side of the curve. Upon entering a straight track, the truck again assumes a central position, and in case of irregularity in the track, or any obstruction, the truck moves laterally without disturbing the movement of the engine." From this it appears plainly that the combination intended to produce the results desired, was of a locomotive engine, with a pilot truck capable, not only of lateral motion, but also of rotation around the king-bolt at its centre. Swiveling on that king-bolt, as well as lateral motion, was, therefore, of the essence of the invention. Such, I think, is the true and reasonable construction of the patent.

That the combination, if an original device of Smith, was patentable, can hardly admit of question. Conceding that the truck used by him was, in all essential particulars, old; that it was the same as the Davenport & Bridges' truck, or that of Kipple & Bullock, it had never before been employed in a locomotive engine, unless so employed by Levi Bissell, to whose patent I shall presently refer. It had been used under eight wheeled passenger cars, and perhaps under eight wheeled freight cars, but in all these both trucks were allowed to swivel freely on their centres around a king-bolt. When applied to a locomotive engine or a car, the hindmost wheels of which are rigid, and cannot swivel, while the operation of the truck is precisely like its operation when under a passenger car, a new effect upon the movement of the engine is produced. The driver or rear wheels move on a curved track with less grinding or sliding, and the friction is greatly diminished. It is not then the case of a mere double use, nor the aggregation of two

devices acting independently of each other, but the production of a new and useful result.

I come next to what appears to me the most important and difficult question in the case, in regard to which my mind has not been free from doubt. Was the combination described and claimed by Smith novel when invented by him? His patent is dated February 11, 1862, and the application for the patent was made on the 10th day of July, 1861. The defendants contend that prior to both those dates, and before Smith had devised his combination, as patented to him, a combination substantially the same had been completed and brought into use by Levi Bissell, and they have given in evidence a patent granted to Bissell on the 4th day of August, 1857.

That patent was surrendered in the year 1864, and a reissue was granted to these complainants, as assignees of Bissell, which, of course, must be regarded as a patent for the original invention. That invention, as described by the patentee, was, in substance, a combination with a locomotive engine of a pilot truck framed to allow lateral motion. Like the invention claimed by Smith, it was not the application to a locomotive of any kind of a pilot truck. The patentee particularly described the distinctive features of the truck he proposed for the combination. While preserving capacity for lateral motion, he dispensed with a swinging bolster and pendant links, and substituted for them a curved sliding beam or block, sliding in a curved groove or slot in the top plate of the truck frame. The general direction of this slot was across the truck, and the curve, both of the slot and of the sliding beam, corresponding with an arc of the circle, the centre of which was a fixed point behind the truck and slightly forward of the centre between the drivers of the engine. This arrangement of the sliding beam in the curved slot admitted lateral motion of the truck under the locomotive, and the tendency to too great vibration of the engine on the truck was limited by inclined planes fitted in the bottom of the slot, at each end and fit block on the sliding beam surrounding the bolt which passed through its centre. "The position of the inclines," said the specification, "is such that the blocks (*n n*) rest in the lowest part of the double inclines when the engine is on a straight track, and on coming on a curve the inertia of the engine (tending to move in a straight line and cause the truck flanges to mount the outer rail) is expended in going up the inclines (*o o*) as the truck moves laterally toward the inner part of the curve, and on coming on to a straight line the blocks descend by gravity to the bottom of the inclines, and the engine is prevented by gravity from acquiring a sidewise or oscillating motion." Other devices were pointed out for attaining the same results, namely, the allowance of lateral motion, and at the same time making use of the weight of the engine to restore it to its normal position when the truck has been moved laterally under it. I think the sliding beam, the blocks, and the inclined planes, may well be regarded as but mechanical equivalents for the swinging bolster and the pendant links; certainly when the links are made to diverge. But there were other features in the truck of Bissell which must be noticed. A primary object which he had in view was "to prevent the truck from swinging around its centre in case of meeting with any obstructions." The patentee pointed

out the difficulties and dangers attending the running of locomotive engines on curves with the pilot truck previously in use. His language was: "There is still a rigid straight line from the centre of the truck to the centre of the axle of each pair of drivers, and this cannot be exactly in the centre line of the track which is curved. This fact contributes with the tendency of the machine to move forward in a straight line, to push the truck outward. The truck is constantly by this means borne to the outer side of the curve, and the engine has a tendency to go off in the direction of the arrow" (in the drawing, i. e., beyond the outside of the curve), "particularly in case a broken rail or obstruction occurs, when the truck swivels around on its centre pin, throwing the locomotive off the track." He then proceeded to set forth how he proposed to remove these difficulties and dangers. "I construct my truck," said he, "in such a manner that the axles of the driving wheels shall be parallel to the radial line of the curve, passing through a point between them; so that the drivers have a direct forward propelling motion along the rails, and do not strain or wear the flanges, and so that two or more pairs of drivers can be fitted with flanges. The central line of the locomotive in going around the curve travels in a position tangential to the curve at a point between the drivers, and I fit the truck wheels in such a manner as to allow the truck a transverse motion. This is equivalent to a bending of the locomotive, the said truck swinging laterally upon an axis of motion (*h*), located centrally between the centre of the drivers and the centre of the truck, or slightly forward of the same, so as to give a slight tendency of the truck to run to the inner side of the curved track." He then detailed the effects which he claimed for his arrangement, and added, "*at the same time there is no chance for the truck to turn on its centre by any obstruction coming in contact with the wheels. The wheels will pass over a broken rail and not be displaced, unless all its wheels are simultaneously unsupported, and even then, the truck being set correctly in an angular position with the drivers, will continue to move in the correct direction, and will pass over any obstacle or broken rail, and attain the uninjured part of the track. In running on a straight track the truck is held correctly in position, and will run over quite considerable obstructions without being turned aside. In running an ordinary engine on either a straight or curved track, one of the truck wheels sometimes breaks off and the truck swivels around on its centre pin in consequence and throws the engine off the track. But with my invention one wheel, or even two wheels on opposite sides of the truck, might break off, and still the truck would not run off the track, because its position relatively to the body of the locomotive is firmly maintained.*" And in his descriptions of his drawings the patentee said of the centre pin (that is, the bolt connecting the engine with the sliding beam): *I, is the centre pin which, in my arrangement, changes its character from a centre of motion to that of a draught block or pin, while the centre of motion is thrown back to the point (h) which is slightly forward of the centre between the drivers.*

Once more, after reiterating some of the results of his arrangement, he said: "By reason of the above facts, and of the further fact that I compel the truck to swivel around the centre (meaning the centre of motion in the rear of the truck frames) in proportion as the truck and

the body move sidewise relatively to each other, I cause the angular position of the truck to conform to the conditions required on a curve, and also steady the truck in running both on curves and straight lines, so that obstacles may be run over, and wheels or axles may fail without allowing the truck to assume a false position."

I make but one other quotation from the specification. In describing his mode of attachment of the truck to the locomotive, he said: "The block (*k*) (that is the curved block or beam, curved from the centre (*h*) and sliding in the curved slot) might be bolted directly to the under side of the engine, and the curved slot would bring the axles of the wheels (*e e*) parallel with the radial line, or nearly so, but to allow an easier motion to the parts, the said block (*k*) may be prevented from turning by radius bars (*i*) to the centre (*h*). I, however, prefer that said radius bars (*i*) should be attached at (3 3) to the frame, so as to cause the truck to swing on the centre (*h*), in which case the block (*k*) may be made use of, or the pin (king-bolt) be fitted to move in a curve slot," as shown in the drawing.

I have made these large extracts from Bissell's specification, in order to show, what I think, in view of them, must be apparent, that whatever else he may have planned, it was essential to his invention that his truck when in combination with a locomotive engine, should be incapable of swiveling on a king-bolt at the centre of the truck or within its frame. Such, undoubtedly, was his purpose, and that purpose his devices, I think, fully accomplished. Whether the locomotive was attached to the truck by being bolted rigidly to the curved block or sliding beam or bolster, which are compelled to move in a curved slot, of which the point (*h*) behind the truck frame was the centre, or whether the block was prevented from turning by the radius bars holding it to that centre, or whether the radius bars were attached to the truck frame, it seems to me that rotation of the truck around any bolt or point at its own centre, or within its frame, was rendered impossible. The truck in its entirety had a centre of rotation at the point *h*, and that there can be but one centre of rotation to one body is confessedly true.

A very earnest and ingenious argument has been addressed to me, and enforced by the exhibition of drawings and a model in order to convince me that in fact the combination of Bissell did allow some swiveling of the truck around the bolt through the sliding beam. I have given to the argument, the drawing, and the model, careful consideration, but I have not been convinced by them. There is a change of position of the bolt, as there is of the block through which it passes when the block slides in the curved slot or groove, for the bolt slides with the block, but the block does not rotate around the bolt, and therefore the truck, of which the block is a part, cannot. It is true, the bolt might be forced to turn very slightly on its own axis, as it is in the model exhibited to me, and thus give an apparent slight rotation of the truck around the bolt. This might be done by carrying the bolt through the curved block and the curve groove or slot, and then attaching its lower end to another slide below the groove in the cross plate, the under slide being constructed to move directly across the frame in a rectangular slot, instead of a curved one, corresponding with the slot above it. The swiveling even then would be almost imperceptible. But such was not

Bissell's arrangement. He devised another centre of rotating motion for the entire truck, and gave no intimation that his arrangement permitted the truck to swivel around two centres of rotation.

The result of this examination of Bissell's patent then must be the conclusion that his invention was the combination with a locomotive engine of a pilot truck, fitted to allow lateral motion, but incapable, when in combination with the engine, of swiveling on a king bolt at its centre. Place now, side by side, with this, the Smith invention, and to my mind it becomes plain that the combinations of the two inventors were substantially different. As has been seen, Smith's was the combination of a locomotive with a truck capable, not only of lateral motion, but also of free rotation around the king bolt at its centre. Lateral motion was common to both, but free swiveling around a centre within the frame of the truck was essential to one, while the impossibility of it was essential to the other. Practically, therefore, the elements of the two combinations were not the same. The operations of the trucks were unlike when they were brought into combination with the engines, and in such combination they may well be regarded essentially different trucks.

And not only so, but different results were obtained from the combinations, alike in the working of the truck and of the locomotives, as well as in their concurrent action. While travelling upon a straight track or on a curve, the radius of which is constant, or invariable, there is no appreciable difference in the working of the Bissell and the Smith arrangements. But when the locomotive is on a straight track and the pilot truck is on a curve, or *vice versa*, or in passing from one curve into a reverse curve, there is a very important difference, for in either of the three cases last mentioned the position and the direction of the truck axles depend in Bissell's combination upon the position of the pin in the rear of the frame of the truck, which is made by him the centre of rotation, and the position of that pin is controlled by the locomotive. Necessarily, therefore, his truck wheels are twisted on the track by the drivers acting through that pin and the radius bars, or through the curved block moving in the curved slot around the pin as a centre. On the other hand, Smith's truck-wheels are never twisted on the track, for the track alone controls their position and the direction of their axles. Swiveling as the truck does on its own central king-bolt, the axles and wheels are unaffected by the direction of the longitudinal centre line of the engine's motion. Of course they assume a correct position, and with the lateral movement, allow the drivers to remain correctly on the track.

I dwell no longer upon this part of the case. I have said enough to show that the truck employed by Smith is, when in combination with a locomotive engine, a substantially different truck from that employed by Bissell; that its mode of operation is different, and that a new and useful result is obtained thereby. And if so, it follows that the patent granted to Smith is not invalid for want of novelty in the invention. The combination is not claimed to have been anticipated by any other than Bissell.

I come now to the consideration of another objection to the Smith patent, which was elaborately urged during the argument. It is, that the invention was abandoned by the patentee, or permitted by him to

be in public use more than two years before his application for a patent. This is, in fact, a double objection, but it may well be considered as one.

It appears from the testimony of Smith himself, that in the year 1853, when in New York, he went on one occasion with a Mr. Bridges, and Mr. Bissell, to the rotunda of the Merchants' Exchange, to examine a contrivance exhibited there for preventing the disastrous effects of the breaking of railroad axles. In the rotunda they found a complete model, on a small scale, of a railroad car, and of a track having a curve and a reverse curve, with the novel invention attached to show the operation. While there, Smith took occasion, having permission from the owner of the model, to illustrate his views of the proper construction of locomotives, having swiveling trucks with swinging bolsters.

What his views were the evidence does not show. But this testimony, it has been argued, is proof that he then dedicated or surrendered his invention to the public. I cannot think so. I cannot see that it shows he then had any complete conception of the invention for which he subsequently obtained his patent, and if he had, the conception was not embodied. For aught that appears his idea may have involved some changes in the locomotive itself—some new mode of construction to adapt it to the use of swiveling trucks with swinging bolsters. He may then have contemplated a truck swiveling on a centre outside of its frame, like the one which Bissell subsequently employed. And whatever his views may have been, very clearly it was not a perfected invention, which could then have been patented, and consequently there was no invention capable of abandonment. I think it would be going unwarrantably far were I to hold that what took place at the Merchants' Exchange amounted to a dedication to public use of the invention which he claimed in 1861, and for which he received a patent. There is, however, other evidence upon which the defendants rely to establish their allegation of abandonment. According to Smith's testimony, the history of his invention was this: In 1856, he was general superintendent of the Hudson River Railroad, and in the fall of that year, or early in 1857, he described his truck to Mr. Buchanan, who was then the master machinist of the road, and illustrated its operation by chalk sketches. At that time, at his suggestion, and under his direction, an engine with the truck was constructed. It was completed on the 16th day of September, 1858; was put upon the road and tried. Manifestly it was an experimental thing. Neither Smith nor Buchanan had full confidence in it. It was first tested without a train, and then with freight and slow passenger trains. These trials seem to have suggested modifications, and two other engines were constructed in another shop of the company, and delivered in July, 1860. Into these several changes were introduced, suggested by observation of the working of the first. Two other engines were built and delivered in the spring of 1861, in which other changes were made, and it was not until their construction that the invention was considered perfected. Very soon afterwards the application was made for a patent. Such is the testimony of Smith, and it is fully confirmed by that of Buchanan. There is a little conflict in the testimony respecting the time when the first engine was constructed. I do not regard it as of importance. It is

impossible to see in all this evidence of abandonment. It was correctly said by Justice Clifford, in *Jones vs. Sewall* (3d vol. Patent Office Official Gazette, 1873, p. 630), to be settled law, that the mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention, and tested its value by actual practice, affords no just grounds for presuming an abandonment: *Kendall vs. Winsor*, 21 How. 328; *Agawam Company vs. Jordan*, 7 Wall. 607. It is true an express relinquishment of an invention to the public is not indispensable to an abandonment. It may be inferred from long delay unexplained, or from acts of the inventor inconsistent with any other theory, but it cannot be presumed from mere delay to apply for a patent when the inventor is all the while perfecting the invention and testing its merits.

Nor has it any bearing upon the case that Smith's experiments were made in public, and that his experimental engines were run upon a railroad that was a public highway. Thus only could the invention be tested. There is an obvious distinction between a public use, or a use by the public, and an experimental use in public. In many cases it has been decided that a use in public for test or experiment is not such a public use as was contemplated by the act of Congress, nor such a use as can be held evidence of dedication to the public. The Nicholson pavement case was notably one.

It has not been contended, and certainly in view of the evidence it ought not to be, that the Smith invention was in public use, or on sale, with his consent, more than two years prior to his application for a patent. It appears to have been used on the Old Colony Railroad in April, 1859; but there is nothing to show that such use was allowed by Smith, or that he knew of it.

My conclusions then upon the whole case are as follows:

1. The combination claimed by Alba F. Smith, and described in his specification, was a patentable invention.
2. The patent granted to him on the 11th day of February, 1862, is not void for want of novelty of the invention. The invention had not been anticipated.
3. There is no sufficient evidence that the patentee abandoned the invention.
4. The patent is not invalid because the invention was in public use, or on sale with the allowance of the inventor, more than two years before his application for a patent.

The only question that remains is, whether the defendants have been guilty of infringement. In regard to this, there is no controversy; an infringement is very clearly proved. I shall therefore order the injunction prayed for in the bill, and decree an account, etc.

Let a decree be prepared accordingly.

Keller & Blake, Esqs., for complainants.

Chapman Biddle and John H. B. Latrobe, Esqs., for defendants.

Eastern District of Pennsylvania.—In Equity.

[Leg. Int., Vol. 31, p. 332.]

BURROWS & LISTER vs. THE LEHIGH ZINC COMPANY.

Burrows' patent for a furnace to be used in the manufacture of white oxide of zinc, not upheld, as he was not the first inventor.

Opinion delivered *October 5, 1874*, by

McKENNAN, C. J.—The patent in controversy here was granted to the complainant Burrows, for a furnace, to be used in the manufacture of white oxide of zinc. Assuming that the furnaces in use by the defendants are within the scope of this patent, a fundamental question in the case is, whether Burrows was the first inventor of them. Simply a question of fact, as this is, I do not deem it necessary to discuss the voluminous testimony touching it, especially as this testimony cannot be fully comprehended and properly weighed without the aid of the models and exhibits in the case. A careful consideration of it has brought me to the conclusion that Burrows was not the first inventor of the furnace employed by the defendants.

In September, 1862, Samuel Wetherill filed a caveat, dated in July previous, in the patent office, and about that time, erected an experimental furnace to illustrate a new method of producing white oxide of zinc, for which a patent was afterwards granted to him. This experiment was successful; and the furnaces now complained of as infringements, were originally constructed with special reference to the practice of the Wetherill process, and in substantial conformity to his experimental furnace.

Burrows made the application for his patent in October, 1852, but it is sought to carry back his invention to the date of experiments made by him in the early part of 1851. According to the preponderating weight of the proofs, these experiments were unsuccessful, and neither as to the form and design of the furnace used, nor the method of its use, was the peculiar structure or special adaptability of the defendants' furnaces indicated. The mechanical devices which were common to both are old, and could not be exclusively appropriated.

The scope of Burrows' patent, in so far as it may be taken to embrace the defendants' furnaces, must, therefore, be limited to the date of his application, and as the form and adaptability of these furnaces were devised by Wetherill, and the furnace was successfully used by him before that date, the complainants' bill must be dismissed with costs, and it is so ordered.

[Leg. Int., Vol. 31, p. 357.]

IN THE MATTER OF THE ESTATE OF JAY COOKE & Co.

After a bankrupt's estate has been placed in the hands of a trustee under the direction of a committee of creditors, by virtue of the 43d section of the bankrupt act, the court cannot, in the absence of fraud, call a meeting of creditors to control the committee's action.

This case was heard before Strong, J., and McKennan, C. J., under the supervisory powers of the Circuit Court under the bankrupt act, on the petition of E. W. Clarke *et al.*, creditors of Jay Cooke & Co., and also

on the petition of E. M. Lewis, trustee of said bankrupt's estate, and of John Clayton *et al.*, the committee of the creditors of said estate.

The petition of E. W. Clarke *et al.*, alleged that on November 26, 1873, Jay Cooke & Co. were adjudicated bankrupts.

That on the 10th day of December, 1873, warrant was issued to the United States marshal, appointing the first meeting of the creditors to be held on the 15th day of January, A. D. 1874, and on the 29th day of January, 1874, the report of the register was made to the said United States District Court of the adjourned first meeting of the creditors; and that three-fourths in value of the creditors whose claims had been proved, had determined and resolved that the estate of the bankrupts should be wound up and settled as provided for in the 43d section of the bankrupt act, and had nominated and chosen Edwin M. Lewis for trustee, and for committee of creditors, John Clayton, Isaac Norris, Robert Shoemaker, Joseph Brown, Charles P. Helfenstein.

That the court afterwards duly confirmed the resolutions of the creditors and the appointment of a trustee and committee of creditors.

That on the 11th of September, 1874, the petition of Oliver Edward Yeakill was presented to the said District Court, in which the said petitioner averred that he had proved a claim against the said estate of \$3,864.92, and praying that said trustee be ordered to file a full account of the bankrupt estate and payments by him made, and such further order as said court might think proper, and that a dividend be forthwith declared. Whereupon, on the same day, the said United States District Court did order as follows, to wit:

"It is ordered that a second meeting of the creditors of said bankrupts, to be held at the Horticultural Hall, Broad street below Locust, in the city of Philadelphia, in said district, on the sixth day of October, 1874, at 11 o'clock A. M., before Joseph Mason, one of the registers in bankruptcy in said district, for the purposes named in the twenty-seventh and twenty-eighth sections of the act of Congress, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867. And it is further ordered that the trustee give notice of said meeting," etc.

That the estate of the bankrupts, from the amount, nature and character of the assets, the difficult questions of fact and law, arising in several of the large claims against it, the number of the partners and rights of their individual creditors, can only be best wound up and settled for the interests of the creditors, by the same being done by the trustee, under the inspection and direction of said committee of creditors, as agreed upon by three-fourths in value of the creditors, and ordered by the said order of the said District Court, made January 30, 1874, as above set forth. That the creditors of said bankrupts are in number over two thousand, and if they could all attend such meeting, it would be impossible for them intelligently to act upon and determine what part of said estate should be set aside, and what part divided; and the other matters on which, by said sections 27th and 28th, under which said meeting is to be held, they are to act; but as by reason of said creditors being scattered over all parts of the United States, as well as of Canada and foreign countries, very many may not be present, and as it needs only one-half in value of the creditors to attend to render the

action of the meeting valid, of whom the vote of a majority in value is binding; if such a meeting be lawfully held, the vote of a little over one-fourth in value, may therefore supersede and overrule the action of the trustee and committee, to whom three-fourths have confided their interests. Your petitioners, however, are advised that by the action of the creditors and order of the District Court of January 30, 1874, transferring the settling and winding up of this estate to said trustee and committee, under the 43d section of said bankrupt act, the powers given to the creditor by the 27th and 28th sections of said act were waived and suspended. The said sections only refer and extend to the winding up of the estate by an assignee, and do not refer to the settling of the estates after the same has been intrusted to a trustee and committee, under the 43d section. They therefore submit respectfully, that the order of the said District Court, made September 11, 1874, was erroneously made, and pray the same be reversed, or so modified as in no way to supersede, change, or affect the winding up and settlement of the estate by the said trustee under the inspection and direction of said committee of creditors.

The petition of the trustee and of the committee of creditors was practically to the same effect as the petition of E. W. Clarke *et al.*

Counsel for petitioners argued chiefly that after the requisite number of creditors had resolved that the estate should be wound up in the manner prescribed in the 43d section, and the court had confirmed the resolution, the District Court no longer had any power to order a meeting of the creditors for the purposes mentioned in the 27th and 28th sections of the bankrupt act; and cited English bankrupt act of 1861, sec. 185-191; Scotch bankrupt act of 1856, 19 and 20 Victoria, ch. 79, sec. 35-40; Eden's Bankrupt Law, 443; Lobson's Law of Bankruptcy, 628, edition of 1872; *Irving vs. Gray*, 3 H. & N. 34; *Shelford's Bankruptcy*, 620; General Order, 21; Bankruptcy Form, 63; 1 Kent, 314. As to control over discretion of trustee: *Williams' Appeal*, 23 P. F. S. 249; *Wain vs. Egmont*, 3 M. & K. 449; *Drever vs. Maudesley*, 16 Sim. 511; *Hayman vs. Governor of Rugsby*, Law Rep. 8 Eq. 28.

Opinion delivered October 28, 1874, by

STRONG, J.—This is an application made by the trustee and committee chosen and appointed under the provisions of the 43d section of the bankrupt act, as well as by some of the creditors of the bankrupts for a review of an order of the District Court directing a second meeting of creditors for the purposes stated in the 27th and 28th sections of the act.

Several objections have been made to the order, only one of which do we propose now to notice. It is that three-fourths in value of the creditors whose claims have been proved, having determined that the estate shall be wound up in the manner prescribed by the 43d section, and their resolution having been confirmed by the District Court, there is no longer any power in that court to order a meeting of creditors for the purposes mentioned in the 27th and 28th sections of the bankrupt act, and that such meeting, if called, would have no authority to resolve and direct as contemplated in those sections.

The bankrupt act of 1867 has very plainly provided two very dif-

ferent systems for winding up, settling and distributing the estates of bankrupts. The first, and the ordinary one, is that prescribed by the 27th and 28th sections, applicable to all cases when the greater part of the creditors in number or in value, who have proved their debts, at their first meeting choose an assignee or assignees, or where the district judge or the register appoints one or more assignees. In such cases the 27th section requires that a general meeting of the creditors be called at the expiration of three months from the adjudication of bankruptcy, or earlier if the court so direct, and requires the assignee to report to the meeting as well as to the court an account of his receipts and payments. The assignee is also required to submit to the meeting the schedule of the bankrupt's creditors, and property as amended, and a statement of the whole estate of the bankrupts as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. The section further enacts, that at such meeting the majority in value of the creditors present shall determine whether any and what part of the proceeds of the estate, after certain deductions, shall be divided among the creditors, with a proviso, that unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine, and in case a dividend is ordered, the assignee is required to pay it under the direction of the court.

By the 28th section provision is made for a second and third meeting of the creditors, with like powers, and it is enacted that at the third meeting, called by the court, a final dividend shall be declared, unless an action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, it is required to be divided in manner aforesaid.

It is further directed that after the third meeting of the creditors no further meeting shall be called, unless ordered by the court; and it is enacted that if at any time there shall be in the hands of the assignee any outstanding debts or other property due or belonging to the estate which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

Thus, it appears, that under these provisions very large powers over the winding-up, settlement and distribution of a bankrupt's estate are given to the District Court and to a majority in value of the creditors who may be present at a general meeting, or in case a majority in value are not present at the meeting, to the assignee.

But the 43d section of the act prescribed another system, the obvious purposes of which were to arrest the ordinary mode of proceeding to wind-up, settle and distribute a bankrupt's estate, to suspend some of the powers conferred upon the District Court, and to confer upon representatives of the creditors authority not to be exercised by the general

body. The system was extraordinary. It was borrowed from a system which had previously existed in Scotland and in England, which had for its object the withdrawal of the bankrupt's estate from the courts in certain cases, and placing its administration in the charge of the bankrupt himself, or in that of the chosen representatives of the creditors.

An examination of the provisions of that section shows very clearly that such was its object, and that the powers conferred thereby are inconsistent with the continued existence of the powers given by the 27th and 28th sections. It is entitled "of superseding the bankrupt proceedings by arrangement." It is true, proceedings under it are declared to be proceedings in bankruptcy, but the ordinary proceedings are superseded by it, and a different system is substituted. It enacts that "If at the first meeting of creditors, or at any meeting of the creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time, and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved, shall determine and resolve that it is for the interest of the general body of creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, *under the inspection and direction of a committee of the creditors*, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, hold, and distribute the estate *under the direction of such committee*. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate be wound up and settled by said trustees, *according to the terms of such resolution*, the bankrupt, or his assignee, if one has been appointed, is required to convey all the property and estate of the bankrupt to the trustee nominated, who thenceforth shall hold it with all the powers and rights which the bankrupt would have had if no proceedings in bankruptcy had been taken, or as the assignee would have had were no such resolution passed, and with all the rights and powers of assignees in bankruptcy."

The section also declares that the consent of three-fourths in value of all the creditors whose claims have been proved, when filed, and the proceedings thereunder, shall be as binding in all respects on any creditor whose debt is provable who has not signed the same as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it, and the trustee is directed to proceed to wind up and settle the estate *under the direction and inspection of such committee of the creditors*. Still further, it is enacted, that the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustee, as if such resolution had not been passed, *and as if all the proceedings had continued in the manner provided in the sections of the act preceding the 43d*.

This last provision, if it were the only one, would leave no doubt in our minds that the manner of winding up, settling, and distributing the estate, was intended to be different from that contemplated by the 27th

and 28th sections of the act. And if this is not so, the 43d section has accomplished no practical results.

If, when three-fourths in value of the creditors who have proved their debts, have resolved that the estate shall be wound up, settled, and distributed, under the direction, not of the court, or the general body of the creditors, but of a committee chosen by them, and their resolution has been confirmed by the court, and when consent to such an administration has been filed, either the court, or a general meeting of the creditors, can control the discretion thus vested in the committee; if a general meeting of creditors composed of one-half in value may determine what part of the estate shall be divided, and when a dividend shall be made, how does the manner of administering the estate differ in substance from the ordinary manner prescribed in the 27th and the 28th sections? What becomes of the power of the committee to direct the settlement and distribution? Moreover, it is worthy of observation that three-fourths in value of the creditors are required for the adoption of the resolution, and only one-half in value are required by the 27th section to constitute a creditors' meeting, competent to exercise the powers described in that section. May a majority of the creditors in value, present at such a meeting, annul or override the action of the trustee and committee chosen by three-fourths? If so, how can it be said that the creditors who did not sign the consent that the estate should be wound up, settled, and distributed according to the terms of the resolution adopted by three-fourths, and confirmed by the court, are bound by the consent and proceedings thereunder, as the statute declares they shall be?

The questions when a dividend shall be made, and what portion of the estate in the trustee's hands shall be divided at any particular time, as well as what sums shall be retained to provide for all undetermined claims not proved, other expenses and contingencies, are questions pertaining directly to the settlement and distribution of the estate. By directing that over the settlement and distribution the creditors' committee shall have the direction, the statute, in our opinion, has withdrawn control over them from every other power, and to that extent has superseded the ordinary proceedings in bankruptcy. And this, we think, was not without reason. The ordinary proceedings are intended to be summary. It is intended by them to conclude the settlement and distribution with the utmost despatch. Thus the 28th section requires a second meeting of the creditors to be called at the expiration of six months from the adjudication of bankruptcy, or earlier, and at a third meeting, when a final dividend is to be declared, unless an action at law or a suit in equity be pending, or other estate come to the hands of the assignee, in which case he is required to convert it into money, as soon as may be, and within two months after such conversion the money is directed to be divided. And it is provided, that if, at any time, there shall be in the hands of the assignee any outstanding debts or other property which cannot be collected and received by him without unreasonable delay or expense, he may sell such debts or property under the direction of the court. It was such hurried settlement of the estate that was regarded as prejudicial in some cases to the interests of the creditors.

For this reason, both in the Scotch and English law, provision was made

for administering bankrupt estates in some cases by the creditors themselves, or by the bankrupt under their direction. And for the same reason the 43d section of our act was enacted, by which the power to direct was given to certain representatives of the creditors; that is, to a committee chosen by them.

No doubt if that committee exercise their discretion *mala fide* they may be controlled, but in the absence of fraud their direction to the trustee must be conclusive. Certainly the discretion vested in them cannot be controlled by any meeting of the creditors called after their appointment.

Holding such opinions, we feel constrained to reverse the order of the District Court, which directed a second meeting of the creditors of the bankrupts for the purposes mentioned in the 27th and 28th sections of the bankrupt act.

The order of the District Court is reversed.

Chas. S. Pancoast and R. C. McMurtrie, Esqs., for E. W. Clarke et al., creditors.

R. L. Ashhurst, Esq., for the trustee.

Samuel Dickson and John C. Bullitt, Esqs., for the committee of the creditors.

Chas. H. Sidebotham, Esq., for Yeakill.

[Leg. Int., Vol. 31, p. 229.]

District of New Jersey.—In Equity.

THE CONSOLIDATED FRUIT JAR COMPANY vs. THOMAS H. WHITNEY
AND SAMUEL A. WHITNEY.

On bill filed for an account, and to restrain defendants from the use of patents under a license alleged to have been fraudulently granted, an injunction order was made by virtue of the 7th section of the act to further the administration of justice, approved June 1, 1872, (17 Stat. 197,) enjoining the defendants from making or vending any fruit jars containing the improvements secured by said letters patent, until the decree of the court upon the motion for an injunction.

Application made to the court to modify the injunction order so as to allow defendants to complete certain contracts for jars, upon the tender of security to the complainant for all damages, and on the affidavit of one of the defendants, that they had purchased the right to manufacture and sell under the license, in good faith, and without notice of the alleged fraud.

The application was refused; the court holding—

1. That all the rights of defendants in the patents were acquired under an agreement, which, in effect, was an attempt to apportion or subdivide the right to use the patents, between a licensee and his grantee; and that whatever may be the law, in regard to the assignment of the entirety of a license, by a licensee, the right to apportion the same among different purchasers did not exist, and such apportionment was void.
2. That where it appeared by the bill, and by the admissions of one of the defendants in his affidavit, that defendants had received notice of pending suit, setting up fraud in their grantors in claiming said patent, their appeal to the equitable powers of the court to allow them to fulfil certain contracts, not listened to, until they should show that said contracts were entered into before they received the said notice.
3. That where the owner of a patent relies upon the use of the monopoly of the invention, and not on the sale of licenses, for his gains and profits, he is not compelled to accept the security which the bond of an infringer may give, in lieu of the protection afforded by the injunction of the court.
4. That in the absence of fraud, in obtaining the control of the patents, the defendants may be protected by security from the complainant against all losses and damages sustained from the interruption of their business, if the court should ultimately hold, that the injunction order was improvidently issued.

Opinion delivered by

NIXON, D. J.—Application is made to the court to modify the injunction order, granted on filing the bill in the above stated case.

The application is based on the ground, that the defendants in good faith, purchased the right to manufacture and sell the jars or bottles, described in the Mason patent; that in like good faith, they have entered into contracts with sundry persons, to furnish such jars or bottles, upon specified terms, and within or at certain times, which contracts are only partially executed; and that if they are now restrained from fulfilling them, they will be subjected to serious losses, damages, etc.

The modification asked for is, that defendants may be allowed six weeks to carry out all unexecuted contracts—not exceeding the manufacture and delivery of 1,500 gross of fruit jars, on their indemnifying the complainant against any loss or damages which may be sustained by reason of their completing the same.

As the case now stands, there are two reasons why the court is precluded from granting this request.

1. It does not appear upon the face of the papers that the defendants have acquired any right to manufacture and sell under these patents. All the authority they have, is derived from the agreement entered into in the month of December, 1873, between the Standard Union Manufacturing Company and the defendants, while the suit was still pending against the individuals, who principally formed and constituted the said company. If I have not mistaken the purport of that agreement, its design was to convey to the defendants, for a valuable consideration, the exclusive right to make and sell the Mason Patent Fruit Jar, patented September 14, 1872, and known in the market as the "Mason Jar of '72," in the city of Philadelphia, and at all the places within fifty miles of said city, and also in the city of Baltimore. Conceding for the purposes of this motion, that the paper executed by John L. Mason to John K. Chace, November 13, 1872, is a valid instrument so far as the rights of these defendants are concerned, who are *bona fide* purchasers under it, without notice of any fraud, yet it must be borne in mind, that such paper does not purport to be an assignment of the invention, but a mere license to exercise the privileges secured by the patents. It is not claimed that the Standard Union Manufacturing Company had more than the rights of a licensee; and while it is an open question whether a license to a party and his *assigns* is a personal privilege, or whether it confers the power of assignment, in its entirety, to third persons, it seems to be understood that a mere license is not apportionable, so as to permit the licensee, as is attempted in the present case, to grant to others, separate rights to use or work the patent, by subdividing the rights, which may have been granted to himself: *Curt. Pat.*, § 213, *Brooks vs. Byam*, 2 Sto. 525.

The case of *Brooks vs. Byam*, *supra*, was this. A patentee of friction matches, by deed under seal, granted and sold to B and his *assigns*, the right and privilege of making, using and selling the friction matches patented, and to have and to hold the right and privilege of manufacturing the said matches, and to employ in and about the same, *six persons and no more*, to vend them in any part of the United States.

Judge Story was in doubt whether the license was not such a personal privilege, that the entirety could not be assigned, notwithstanding it was given to B and his assigns, and left the question open, because it was not necessary in that case to decide it.

He held, however, that the right granted by the above deed was a license or authority, coupled with an interest in the execution, to the grantee and six persons, to be employed by him, in making matches; that the right was an entirety, incapable of being apportioned or divided among different persons, and that, therefore, the assignment by B of a right to make as many matches as one person could roll up, was void. The learned judge, in his opinion (page 545), pertinently remarks: "The language ought, in my judgment, to be exceedingly clear, that should lead a court to construe an instrument of this sort, granting a single right or privilege to a particular person or his assigns, as also granting a right or license to split up the same right into fragments, among many persons, in severalty, and thus to make it apportionable as well as transmissible. The patentee might well agree to convey a single right as an entirety to one person, to manufacture the matches and to employ a fixed number of persons under him, when he might be wholly opposed to apportioning the same in severalty among many persons."

On the other hand, it appears by the bill of complaint, that on the 6th of January, 1873, Mason executed assignments to the complainant, of the legal title to the patents, the right to the monopoly embraced in the inventions. Admitting that this is held subject to the license granted to Chace, the attempted apportionment of the authority to use the license, between the grantees of Chace and the defendants, must be treated as void against the complainant.

2. The other ground, on which the court should refuse to modify the injunction order, appears from considering the defective character of the affidavits on which the motion is founded.

The bill charges, that the complainant brought a suit in the courts of New York, to declare the license from Mason to Chace fraudulent and void; that the rights of the defendants were acquired *pendente lite*, and that the defendants had actual notice of the pendency and character of said suit.

The only defendant that files an affidavit is Samuel A. Whitney, who states, that neither he, nor his brother, the other defendant, had anything, or very little, to do with the entering into said agreement, and had no acquaintance with John L. Mason, the President of the Standard Union Manufacturing Company, by whom on the part of that company, the said agreement was wholly made; that on the part of the defendants, one Thomas W. Synnott, who was at the time, and long before, and ever since has been their agent and clerk, conducted all the negotiations with said Mason, that led to the agreement, which, when concluded upon, was drawn up by said Synnott, and by him delivered to defendants for approval and execution, and in the approval and execution, it was assumed, without inquiry or doubt on their part, that the said company were the true, legal and *bona fide* owners of the said letters patent and the extensions thereof, and had full power and authority to grant a license

to said defendants, to manufacture and sell said fruit jars, to the extent agreed upon in the said articles of agreement; and that so far as he knows and believes, the said Synnot, as the agent of the defendants, acted upon the like assumption of ownership, and a right of said company, and, in like good faith, in negotiating and effecting the said agreement. He further admits, that since the agreement was entered into, and contracts for manufacturing quantities of fruit jars were made by defendants, in good faith, he received notice of the suit in the city of New York involving the right of the Standard Union Manufacturing Company to said letters patent or some of them, and the extensions thereof, but he fails to make any statement in regard to the essential fact, whether the large contracts for the sale of bottles or jars to third parties, which they now ask the privilege to carry out, were made prior, or subsequent to the notice and knowledge of said suit. This is an appeal to the court for the exercise of its equitable powers to relieve parties from the harshness of the rigid application of legal rules and principles, and before the court can interpose, some equitable reasons should be clearly revealed. Whatever relief, under this head, the defendants might be entitled to, in regard to contracts entered into by them, before they had notice of the alleged fraudulent title of their grantors, they have no claim to be relieved from the consequences of their engagements and contracts after such notice. The absence of all information as to the respective dates of the notice of the pending suit, and of the contracts sought to be exempted from the restraint of the injunction order, is significant, and, in default of explanation, is fatal to the motion.

It was suggested by the affidavit of defendant and by their counsel at the hearing, that the defendants were able and willing to give bond, with security if required, to indemnify the complainant against any loss or damage it may sustain by reason of their being allowed to complete the said contracts.

But, it seems to me, that this case comes clearly within the spirit of the rule, now so well established, that where a case reveals the right in the complainant to the protection afforded by an injunction, the defendant cannot defeat it by tendering security for damages; *Sickels vs. Mitchell*, 3 Blatch. C. 548; *Hodge vs. The Hudson River R. R. Co.*, 6 Id. 165.

In patent cases, especially, where the owner depends upon the use of the invention and monopoly, which the ownership affords, for his gains and profits, and not upon the sale of licenses to others, it is impossible to afford adequate protection by a bond of indemnity, because there are no sufficient data existing, on which the damages or profits can be estimated.

The injunction order, in this case, was granted by virtue of the provisions of the 7th section of "the act to further the administration of justice," approved June 1, 1872 (17 Stat. 197). Whether it will result in granting a provisional injunction depends on the answer or the affidavits of the defendants on the hearing. In the meantime, the law vests the court with a discretion, as to compelling the complainant to give security to the defendants for the losses, which they may sustain by

reason of the injunction order, if it should afterwards appear, that they had the right to use the patents in question.

As there are no charges of actual fraud against the defendants, I am disposed to entertain a motion on their behalf, to require the complainant to give such security to the defendants, and will hear their counsel at any time, in regard to the amount of the penalty of the bond to be executed, on proof of notice to the complainants of such application.

A. Browning, Esq., for defendants.

A. Q. Keasbey, Esq., for complainant.

District Court of the United States.

Western District of Pennsylvania.—In Bankruptcy.

[Leg. Int., Vol. 30, p. 232.]

In re JOHN V. McDONALD, A BANKRUPT.

On the death of an involuntary bankrupt before a jury trial has been had to determine whether he has committed an act of bankruptcy, the proceedings must abate.

Opinion delivered *July 11, 1873*, by

MCCANDLESS, J.—On the 4th of April, 1873, a creditors' petition was filed against John V. McDonald, alleging several acts of bankruptcy. To this he filed a denial on the 12th of April, 1873, and demanded a trial by a jury, which was ordered. On the 28th of May, 1873, and before a jury trial could be had, his executors, by counsel, came into court and suggested his death as having occurred on the 22d of that month. At their instance a rule was granted on the petitioning creditors to show cause why the petition and all the proceedings thereunto should not abate.

The question presented for our consideration is, does the death of McDonald terminate the proceedings in a court of bankruptcy?

Judicial legislation is a dangerous encroachment upon the constitutional rights of Congress. Without its employment, I cannot extend the provisions of the bankrupt law beyond the present status of this case. Realizing the justice of such an application to its existing features, I have tried to find authority for it in some one or more of its sections, but have not been able to do so. To apply the broad principles of equity practice to an act of legislation, comprehensive in its terms, and designed to meet every possible contingency in the affairs of the debtor, is the exercise of a doubtful authority, and should be avoided by the judiciary.

Were this a voluntary proceeding the statute provides for it by declaring, in the 12th section, that if the debtor dies after the issuing of the warrant, the proceeding may be continued and concluded in like manner as if he had lived. In such cases he had already been adjudicated a bankrupt, and complete jurisdiction over his person and property had been acquired by the bankrupt court, and there is no good reason why it should be transferred to another forum. In a proceeding by the creditors there is no such provision; the attitude of the party is wholly different; the process is simply inchoate; he has not been declared a bankrupt; he denies all the acts of bankruptcy charged in the petition, and demands that their truth or falsity may be determined by a jury. These are analogous to torts in an action at law, suits for which abate on the death of the party. Even if we thought that the 12th section applied to cases of involuntary bankruptcy, it could not apply here, for no warrant has issued, and could not issue until after an adverse finding by the jury, and a decree of adjudication. Many of the clauses in the involuntary sections of the bankrupt law are penal in their nature. With what propriety can you visit these upon a representative man, upon the executor, who is the appointee, and, post mortem, the

legitimate representative of the dead man, or upon the administrator, who obtains none of his powers from the decedent, but is appointed by, and derives all the authority from the register of wills?

In construing this act of Congress, I can give it no other interpretation, and as this is a question of the first impression, I suggest an early appeal, that it may be definitely settled in this circuit.

The rule is made absolute.

Messrs. *Watson, Wood, and Weir*, for the rule.

Mr. *Stoner* and District Attorney *Swoope*, contra.

[Leg. Int., Vol. 30, p. 272.]

In re NATIONAL IRON COMPANY.

In an application for the sale of real estate by a bankrupt's assignee, the proper inquiry for both the assignee and the court, is on what terms will it bring most for the creditors, subject to or discharged from, the incumbrances against it.

Alex. K. McClure, Esq., on behalf of A. H. Dill, Esq., assignee, presented a petition for an order of sale of the property, consisting of two furnaces, rolling mills and other real estate at Danville. Hon. H. B. Swoope, representing creditors unsecured to the amount of \$58,000, and the president of the company, moved the court to dismiss the petition that the assignees might go on and sell under his general powers, subject to the incumbrances, there being mortgages to the amount of \$750,000, not due for twenty years to come, and it being manifest that a purchaser would give more for the property if he could avail himself of the long payments on the mortgages than if he had to pay all cash at once, on a sale divested of liens. Hon. Samuel Linn, of Williamsport, who represented a mortgage of \$250,000, argued in support of the motion to dismiss. Mr. Grier, of Danville, representing unsecured and judgment creditors to the amount of some \$140,000, argued against the motion, and urged a sale divested of all liens, etc. John C. Bullitt, Esq., of Philadelphia, representing a mortgage of \$500,000, and other interests, argued in support of the motion to dismiss. Mr. Stoner, of Pittsburgh, who appeared for certain bondholders, urged a sale subject to the existing liens. The argument was concluded by Mr. McClure for the assignee, who stated that the petition had been presented to relieve the assignee from responsibility, but that he was of opinion the property would bring the most money, if sold subject to the incumbrances.

Opinion delivered *August 13, 1873*, by

MCCANDLESS, D. J.—Although the petition in this case prays for an order of sale, it has been treated at the argument more as advisory of the assignee than an application for the sale of the property. The estate is largely encumbered with both judgments and mortgages, all of the former subsequent in date to the latter. It is moved to dismiss the petition that the property may be sold by the assignee under his general powers, subject to the existing legal liens and incumbrances. It is further moved to order a sale discharged of all liens except those given for security of the purchase-money. We are not inclined to favor either of these propositions in the shape in which they are presented. The property should be sold for the purpose of paying the debts of the cor-

poration. The proper inquiry for both the assignee and the court is, on what terms will it bring most for the creditors? It is conceded that the lien for the purchase-money should be protected. Why should not also the security given for the bonds of the company in the hands of innocent holders? The judgment creditors dealt with them on the faith of the corporation and with recorded mortgages staring them in the face. What equity can they claim over the mortgage creditors? As to the validity of the \$500,000 mortgage, which has been impugned at the argument, this is not the stage of the case at which to attack it, nor the proper mode of attack. It can be assailed, if it be vulnerable, at another time, and before the proper forum. As presented now, it is a valid lien, and entitled to the protection of the court.

Entertaining these views, the motion to dismiss the petition is refused, as also to sell discharged of all liens, except the purchase-money, and upon application the court will order a sale by the assignee, discharged of all liens and incumbrances, excepting the existing and recorded mortgages.

Now, August 13, 1873, on motion of H. B. Swoope, solicitor of the assignee, it is ordered that the assignee sell at public or private sale, as he may deem most advantageous for the creditors, the property described in his petition, divested of all judgments and liens except the three recorded mortgages (being the mortgages for \$250,000, \$500,000, and \$3,000, respectively), sale to be made on due notice, in accordance with the rules of the court.

[Leg. Int., Vol. 30, p. 321.]

WILSON vs. CHILDS. ANSHUTZ vs. CAMPBELL. *In re* DAVID WEAMER.

The right of an execution creditor or landlord upon a warrant issued before the commencement of the proceedings in bankruptcy, is paramount to the assignee in bankruptcy, and will control the fund as against the general creditors. An injunction refused because no bill in equity had been filed.

Motions for injunctions. Opinion delivered by

McCANDLESS, J.—As nearly the whole of this week has been occupied with the argument of these cases, and I am compelled to leave to-day for Williamsport, to hold the court there on Monday next, I have no time to elaborate an opinion upon the points submitted by the learned counsel for the respective parties. All the court can do is to state the result, and the simple principle which must govern us in these, and in all like cases in the future. The recent decision of the Supreme Court of the United States in the case of *Marshall vs. Knox* (30 Legal Intelligencer, page 273), must control us and be our guide in the determination of the question. It is there held, that where an execution has issued from a State court, and a levy has been made before the commencement of the proceedings in bankruptcy, the possession of the assets cannot be obtained by the assignee. The latter, in such cases, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. As by the laws of Pennsylvania the execution is a lien upon all the personal property of the defendant from the moment it reaches the sheriff's hands, the right of the execution creditors, or of a landlord upon a warrant

issued before the commencement of the proceedings in bankruptcy, is paramount to the assignee in bankruptcy, and will control the fund as against the general creditors. But inasmuch as no bills in equity have been filed in any of these cases there is nothing upon which a motion for an injunction can rest, it therefore, for this reason, must be disallowed, independent of any question upon the merits. The preliminary order is dismissed.

Eastern District of Pennsylvania.

[Leg. Int., Vol. 31, p. 173.]

ESTATE OF THE FRANKLIN SAVING FUND SOCIETY, BANKRUPT.

Where no question of disputable right exists, assignees in bankruptcy cannot obtain the instruction of the Court, whether to do a proposed act, which, if proper on their part, would be within their own discretion and power on the administration of their trust.

Opinion delivered *May 27, 1874*, by

THE COURT.—The amount due by the bankrupt corporation to the depositors is believed to be \$859,000, with accruing interest. The available assets in the actual possession and control of the assignees are estimated by them at \$520,000, or about 60 per cent., which is, perhaps, however, a high valuation. I understood one of the assignees to say, in court, that he considered it too high. Assuming its correctness, the probable deficit would be \$339,000, or nearly 40 per cent. without any computation of interest. The deficit may be much greater.

It is important, therefore, to consider the recourse of the assignees in bankruptcy to other property, which is in the nominal ownership or control of the defaulting treasurer of the bankrupt company.

This property, as he estimates it, is of the value of \$284,000. The amount of his debts to others than the company has been very differently stated by him at different times. He now states the amount of those other debts to be \$42,437, of which he represents \$25,900 to be unsecured. But \$4,200 of the unsecured, and \$12,000 of the secured amount, together \$16,200, are alleged to be due to one of the persons whose neglect of duty, when directors of the company, is considered by the assignees to have enabled the treasurer to abstract the funds. The past relations of other alleged creditors may also be such as to render them responsible, in whole or in part, for his defaults. All the claims included in the \$42,437 will probably, more or less, for various reasons, require scrutiny.

From the papers exhibited, it may be inferred that his estimate of the value of the property as \$284,000 is partly speculative and prospective, requiring for its realization two years or more of time, with favorable contingencies. Independently of any rebate for loss of interest from delay, the estimate, being his own, may be very high. But the dependency must, at worst, be very valuable.

The assignees appear to assume that this treasurer's present liability for his embezzlements and other breaches of trust, is only for the amount of the anticipated deficiency of the assets now in possession. Arithmetically, as between the assignees and the depositors, this may not be an incorrect way of considering the matter, because the greatest value

of all the property in this person's nominal ownership, as yet discoverable, appears to fall short of the smallest estimate of such deficiency. But, as between the assignees and himself, his legal and equitable relation is altogether different. It is that of *primary* responsibility for the whole original amount of the funds abstracted, and for the gains and profits, or for interest if the gains and profits cannot be discovered. Under the auxiliary jurisdiction of the Circuit Court, a suit in equity in that court has already been instituted by creditors against him and others, in which the assignees may become complainants if they have not already done so. In the present stage of that suit, the bill is amendable, as of course, in the clerk's office.

The amount of his primary liability, if the assignees limit their demand to the moneys fraudulently abstracted with legal interest, is already ascertained by his own written admissions in his examinations in bankruptcy. The lowest primary amount is the sum of the unpaid deposits, less only the few dollars which were on hand at the commencement of the proceedings in bankruptcy. He is not entitled to any credit for pretended investments when made, because none were made honestly in the name of the company. The decree in equity will be primarily for the full pecuniary amount. He will be entitled from time to time to reasonable credits for *not* cash when realized by the assignees. But this will not prevent them from issuing execution in the meantime, on the decree, for the unpaid part of the sum primarily due.

Such a primary decree will not, nor will, under proper equitable direction, such an execution, preclude the complainants from obtaining, under proper amendments and adaptations of their bill, the further specific relief to which they may be equitably entitled. The property in question may be classed under three heads: (1) Property traceable as investments, products or substitutes of the funds abstracted by him: (2) Property acquired with funds of uncertain source: (3) Property which was acquired by him before any of his embezzlements, or is otherwise provable to have been acquired with funds not of the bankrupt company.

Under the first head, all the investments, products or substitutes which are traceable, however often or variously changed in form, or name, can be followed and reclaimed.

Under the second head, if, through confusion or obscurity caused or promoted by acts or omissions of the wrongdoer, the tracing or ascertainment becomes difficult, all doubts ought to be resolved against him, as the party putting out the light, or otherwise occasioning the difficulty. Every legal and equitable presumption is against such a party. On this principle the injunctions in the pending suit in equity were granted in a general form.

Under the third head, the ultimate remedy is by execution only. But the property cannot be put out of reach of an execution.

With reference to his debts to other creditors, the case may be considered under the same three heads, but not in the same order of succession.

Under the third head, and perhaps also under the second, the recourse of the assignees against such portions of the property as cannot be considered investments or products of, or substitutes for, funds of the com-

pany, will be to give to the pending suit the form, in this part of it, of a creditors' bill. As to such property, they will sue therefore, as well on their own behalf as on that of such of his other creditors as may become parties to the bill, and may establish their respective demands.

Under the first head, as to property acquired originally or derivatively with funds of the company, the exclusive right of the assignees cannot be impaired by the existence of the other debts.

But, in order to simplify the litigation, the assignees may, as complainants, be willing, perhaps ultimately, to waive, even in this respect, their strict rights. In favor of the fraudulent party himself, these rights of course cannot be waived. Nor can the concession be made by the assignees in favor of his other creditors, unless on reasonable and equitable conditions. But, under such conditions, property which cannot, as between the assignees and this defaulter, be considered his estate, may perhaps be so treated in favor of other creditors, by way of concession, to promote equality and promptness of distribution.

In the meantime, the bankrupt law would, if there were no injunction, prevent any preferential disposition of his property for the benefit of such other creditors. If he should attempt it, proceedings in bankruptcy against him could be instituted so as to frustrate the attempt. The papers exhibited by the assignees indicate that he has already threatened, or proposed, such a preferential disposition. This will, under a properly framed amendment of the bill, furnish an additional reason for continuing the injunction till the final hearing of the cause.

The final hearing cannot be long deferred, because the proofs will probably consist almost wholly of admissions by defendants in their own examinations heretofore taken.

The assignees now report that this treasurer of the bankrupts has fully recognized his liability for any deficiency which may be ascertained to exist, and has proposed "to mortgage or assign to them his individual property to meet the same." By "his individual property" is meant of course the property and effects of which he is the nominal owner. In the report of the assignees, they proceed to describe the offer, which appears, by their description of it, and by the suggested form of a deed annexed, to be very different in substance from what the introductory words above quoted might seem to import. It is in essential respects objectionable.

He proposes a trust only "to secure the payment of any deficiency that shall be ascertained in the assets of the corporation bankrupts to pay all obligations due by the same." This language of the proposed deed is, to say the least, extremely equivocal on the question whether a primary liability on his part, or only an eventual accountability would be secured. The question whether the trust would be available at all, until the assignees shall have themselves fully accounted for assets already in their possession, would thus be open to litigious contention.

Again, there is to be a compulsory postponement for two years of the definitive execution of the proposed trust. This would be repugnant to the nature of the trust vested in the assignees. They may, indeed, in their discretion, postpone its execution as to subjects requiring delay. But they should not surrender their discretionary power. Their general duty is to make the assets available with the least possible delay.

Moreover, the deed provides that the trust is to be saddled, for the two years, with an irrevocable agency of the defaulting treasurer himself. This may, perhaps, not have been intended. The intention may have been only to bind him to render service in such an agency, if it should be required of him by the assignees. If so, the language used would need careful reformation. But I do not think that they ought even to be authorized to delegate any authority whatever to him.

A peculiarly objectionable provision, also proposed, is that which would, on the execution of the deed, release him absolutely from his indebtedment and liabilities. If this man, however guilty, should make all the atonement in his power, future forbearance on the part of the assignees might not be improper. If he should make an unconditional assignment or mortgage, of all his nominal and actual estate, for the equal benefit of all his creditors, forbearance might be accorded, unless other frauds be hereafter discovered. But the forbearance ought to be discretionary on the part of the creditors represented by the assignees. I think, however, that such property, nominally his own, as he may effectually transfer, might be credited absolutely to him at once, on account of his debt, at a certain valuation; and this valuation might reasonably be a liberal one. But a release of the excess of the debt, without receiving any equivalent, ought, when we regard the manner in which the debt was incurred, to be considered out of the question. The moral objections are insuperable. But, independently of them, such a release would be impolitic. It would probably embarrass the recourse of the assignees against the company's former directors for neglect of their duty. Such directors might object, that the release was of the party who, having used the funds which were abstracted, was primarily liable.

His son, and his nephew, in whom respectively the legal estate in parts of the property is vested, would, on their executing the proposed deed, be also released from all demands of the assignees. For this the reasons may be sufficient.

Another proposed provision to which I have already, in part, alluded, is that, of the property valued by him, as above, at \$284,000, certain portions which he values at \$48,000, shall be set apart for the preferential security of the other creditors whose debts he now computes at \$42,437. Under this head a separate trust is proposed. Objections to the complexity of this part of the plan are answered in the report. They will not be considered here. The substantial objection is different. It is the *preferential* character of the proposed security for the exclusive benefit of those other creditors. I have already suggested that, so far as their demands can be established as valid, they ought perhaps to stand on a footing of equality. But why they should be preferred, to the exclusion of the assignees, no reason has been suggested.

Some other objections it is not necessary to specify. They would be consequent, in principle, upon those which have been stated.

The assignees report the proposed arrangement, expressing "their *willingness* to close with the proposition;" and ask the court's "instruction whether or not they shall accept the same."

Here they mistake, I think, the judicial function of which they invoke the exercise. This court of bankruptcy is legislatively made a

court of summary equitable jurisdiction over them, and over their trust. Therefore, independently of any special provisions of the bankrupt act, the court could, by way of direction to them, as trustees, decide any question of legal or equitable right, which could be contentiously discussed for opposing interests. But here no such question properly arises. The assignees have power, on their own responsibility, to perform the act in question, unless it would involve a breach of trust. A trustee cannot obtain the direction of a court of equity as to the mere administration of his trust, in matters within his own discretion or power. But assignees in bankruptcy are not simple trustees. They are also, in a certain sense, officers of the court of bankruptcy. Therefore, to prevent misconception, I state the objections which suggest themselves. So much for the general question.

The question may next be considered under the bankrupt law. The 17th section enacts that the assignee may, under the direction of the court, submit to arbitration any controversy arising in the settlement of demands against the estate, or of debts due to it; and may, under such direction, compound and settle any *such* controversy by agreement with the other party as *he* thinks *proper*, and most for the interest of the creditors. There is no other provision of the act which can be cited on the question, and this provision does not apply to it. There is no suit or demand against the estate, and no controversy whatever as to a debt due to it. On the contrary, the report of the assignees expressly affirms that the treasurer unqualifiedly admits his liability for the debt. The only question is an undefinable one, which they seem to apprehend may arise in making available their judicial recourse for an indisputable demand.

If the enactment of the 17th section applied at all, it would be necessary for the assignees to take unequivocally upon themselves the direct responsibility of recommending the arrangement, as, in their opinion, a *proper* one. This they have not done; and they seem to have advisedly omitted doing it. If they had certified their opinion that it would be proper, and I had been able to take cognizance of the question, I could not have concurred in their opinion.

I do not think, on the mere ground of expediency, that the additional protracted and complex trusts proposed would be likely to relieve the estate from litigations, or to expedite its distribution. I see no reason that a decree in the present suit in equity may not be speedily obtainable. There will, in the meantime, be every facility for occasional interlocutory directions.

Nevertheless, it would, of course, be highly expedient that the purposes of that suit should be attained through a proper submission of the guilty defendant. I have already intimated to what extent the assignees, upon his making such imperfect atonement as may still be in his power, might be justifiable in according future forbearance to him. But they should not allow him to impose arbitrary conditions upon those who are sufferers from his delinquencies.

Nor should he exact compensation for rendering to the sufferers any service within his power.

It is to be recollected that the questions which have been considered are entirely unconnected with the collection, disposal, or distribution of

the assets now in possession, which are of the estimated value of \$520,000. It was admitted, on the argument, that such collection, disposal or distribution of them could not be facilitated or expedited by the proposed arrangement, if it had been carried into effect.

I have only to add, that if the estimate of \$520,000 is too high, or too low, there should be a reappraisal, in order that the unfortunate creditors may not have incorrect expectations. The assets consist mainly of securities whose value does not, like that of merchandise or stocks, depend upon fluctuations of a sensitive market; and there will, under efficient administration, be no danger of sacrifice.

[Leg. Int., Vol. 31, p. 229.]

STOTESBURY *et al.*, ASSIGNEES OF THE FRANKLIN SAVINGS FUND SOCIETY, BANKRUPTS, *vs.* CADWALLADER *et al.*

Bankruptcy—Equity—Pleading—Amendment—Creditors' bill—Dower of bankrupt's wife.

Opinion delivered July 11, 1874, by

CADWALLADER, D. J.—This case was heard upon the bill, and amended and supplemental bill, and upon the answers of certain defendants, and the respective replications, and upon certain proofs adduced, among which was the examination of the defendant, Cyrus Cadwallader, in the court of bankruptcy, etc. Whereupon the court, after hearing counsel, was of the opinion that the subjects of the litigation might be considered under three heads, to wit: 1st. Property and effects traceable, as investments, products or substitutes of the funds of the bankrupt corporation, and in which no defendant has any pretence or color of beneficial interest. 2d. Properties and effects acquired with funds of uncertain source, but as to which the burden of proof is on the defendants, who hold the apparent legal estate, to show that the same are not beneficially the bankrupt corporation's. 3d. Property and effects which from the date or mode of their acquisition are apparently the defendant, Cyrus Cadwallader's, and as to which the burden of proof is on the complainants to establish the contrary. The court was further of the opinion that the complainants are entitled to an immediate decree under the first and second heads, but that, as the pleadings now stand, such decree could not be carried into effect without an inquiry under each head before a master.

Under the third head the complainants would not have any relief, as the bill is now drawn. But it is amendable (and the case has been discussed by counsel, as if it had already been amended) by being converted under this head into a creditors' bill. This will be explained. The answer of the defendant, Cyrus Cadwallader, suggests what, at first view, might seem to impede any action of the complainants under a creditors' bill. He suggests that there are other creditors who ought not to be affected by such a bill. The answer to the objections that the complainants in such a bill would sue as one of a class, and would sue in this respect as well on their own behalf as on that of all other creditors who may become parties or may otherwise establish their right to participate in the avails of the suit under this head. If it be further objected that execution at law would be the only proper remedy under

this head, the extraordinary peculiarities of the case furnish an answer to the objection.

The answer is, that the complainants are (under the three-fold character of the subjects) frustrated of all present available recourse at law, by reason of the necessity of equitable investigation for the discovery and ascertainment of the proposed classification of the subjects. This, I think, makes the case a proper one for equitable redress throughout. It is the only means of obtaining prompt relief.

From what has appeared of the proportional amount of the other debts, which is comparatively very small, I incline to think that a determination of the whole controversy as to the three subjects might be speedily reached without undue sacrifice by the complainants of any right of the general body of the creditors in bankruptcy.

There is no inconsistency in the complainants claiming both as beneficiaries and as creditors, and their claim in the latter capacity is good until they obtain satisfaction by payment in the former capacity.

Now their amendments, as proposed, may be made by giving in this alternative such an aspect to their bill as to cover contingently all the subjects of litigation as to which any possibility of doubt can be reasonably suggestable. In this form of a creditors' bill a decree can, perhaps, be made at once, dispensing with inquiries before the master under the first and second heads, and for the benefit of other creditors of this defendant, giving to the bill the character of a creditors' bill throughout.

But on this point a final opinion cannot be pronounced without seeing the proposed amendment, and a draught of the decree proposed, and perhaps a draught also of the conveyances, by which effect is to be given to such decree.

Of course there can be no reservation of any benefit to this defendant, Cyrus Cadwallader, or to any of his family, as voluntary beneficiaries. But it has been said that his wife is willing, for a small consideration, to unite in the conveyances in such manner as to bar her dower. If, for an amount not exceeding that which has been named, she will so unite, it would be a very judicious payment on the part of the complainants.

She cannot be compelled to unite in the conveyances, and if her dower could, in Pennsylvania, be defeated, as perhaps it might be by forcing sales under the present bill, and its proposed amendment, this could not be done without increased expense, delay and complexity.

Nathan H. Sharpless, Esq., for complainants.

James W. Paul, R. C. McMurtrie, George Junkin, E. O. Michener, Esqs., contra.

Eastern District of Pennsylvania.—In Admiralty.

[Leg. Int., Vol. 31, p. 237.]

**ON THE LIBEL AND AMENDED LIBEL OF CORNELIUS BRADY,
AGAINST THE AMERICAN STEAMSHIP CO. OF PHILADELPHIA, FOR
SALVAGE.**

The rule of maritime law that a passenger who has no opportunity to leave a vessel in distress, cannot render a salvage service, may admit of a qualified exception where he has promoted her safety by an extraordinary and peculiar service which he was not compellable to render. But in admitting such an exception in favor of a passenger, the greatest caution is necessary, and especially so where he is of the nautical profession.

Where a passenger of the nautical profession who had rendered such service, afterwards assumed and exercised illegitimate authority over the vessel, though the circumstances were not such that he incurred an absolute forfeiture of the salvage compensation, its amount was nevertheless materially reduced by reason of such usurpation of authority.

Opinion delivered *July 21, 1874*, by

CADWALADER, D. J.—A vessel manned and otherwise fitted for a voyage is often spoken of as having an organized representative or artificial personality. A public armed vessel represents the sovereignty of the nation to which she belongs. A merchant vessel represents a little private community. It is a definite organized portion of the social system of her nation. Judges on both sides of the Atlantic have assimilated such a vessel, when on the high sea, to a floating portion of this nation's territory, of which, though temporarily detached, it continues to be a part. Her internal relations are determined by its laws, and her external relations by the laws of the sea, which constitute a part of the system of universal jurisprudence. Under certain qualifications, her exterritoriality is, through international comity, recognized, even when she is in foreign territory.

These observations, in part, explain the remark of Montesquieu, that mariners are citizens or inhabitants of the vessel. They cannot rightfully leave her, unless their association with her is legally at an end, through the conventional termination of their voyage, or otherwise. Till then they can be compulsorily detained in her.

The relation of a passenger to the vessel is different. If a sailor has been rightly described as an inhabitant of the vessel, and as in subjection to her government, a passenger may be compared to a mere sojourner in her who is only in temporary subjection. A passenger, while on board, may, indeed, be considered as one of her company, but not in the same light as one of the crew. The passenger may leave her at his pleasure, if an opportunity occurs before the end of his conventional passage; and may do so even in time of danger, however great.

For this reason, if the vessel is in distress, and a passenger who has an opportunity of leaving her chooses to remain on board, he may stand afterwards, upon a question of salvage service, nearly or quite in the same relation as if he were not associated with her at all. He may therefore entitle himself to compensation of the nature of salvage, by rendering even service of ordinary bodily labor, as in pumping, or otherwise. But where he has had no such opportunity of dissociating himself

from the vessel, he is, in time of danger, compellable to render, to the utmost of his ability, like service with any other person of her company; and, as to such service, cannot have any claim of salvage.

It by no means follows that a passenger peculiarly capable of rendering extraordinary service, far beyond that of one of a good crew, is, in all cases whatever, compellable to render it, or that, if he does render it with useful effects, he cannot, in any case, become entitled to compensation of the nature of salvage. We may suppose the case of a ship, or her cargo, partially on fire, the ship having on board a passenger who is a chemist, with a sort of travelling laboratory. He may have, in this laboratory, the probable means of checking the fire, but, perhaps, not without some risk, to himself and others, of increasing the danger. If, by professional skill and judgment, under the authority of the navigator of the vessel, the chemist makes the experiment, and there is a successful result, is he to receive no compensation? If he should be compensated, is not the compensation for a service of the nature of salvage?

The decision in the case of the steamer "Great Eastern" answers the question. When that vessel was three hundred miles from land, her paddle-wheels were disabled, so that she could be moved by the screw alone. While she was in this condition, the rudder shaft was broken, and was disconnected from the steering gear, so that she became quite unmanageable. Her officers in vain endeavored to substitute and secure some appliance by which to work the shaft. A passenger, who was a mechanician, then devised, and, with the consent of the master and the assistance of the crew, executed, a plan for the purpose, which was successful. This was done by a skilful use and adaptation of fixtures, tackle and apparel of the vessel herself. For the service \$15,000 was decreed to the passenger as salvage: (11 Law Times, N. S. 516.) The reason of the decision was that this highly beneficial service had been peculiar and extraordinary, and such as he was not compellable to perform. This decision is, I think, right in principle. But it establishes what must be considered as an exception from a rule. The rule is, that a passenger cannot be a salvor. The exception, lest it should engender litigation, and promote insubordination, must not be admitted without the greatest caution. Especially must such caution be observed where the passenger is of the nautical profession.

In the present case, a large steamer, worth perhaps half a million of dollars, with passengers and a cargo, having four officers, besides the master, encountered, in mid-ocean, a tempest of great violence. During the storm, when changing watches at midnight, she shipped a heavy sea, which stove in the forward hatches, and swept away the house forward, carrying overboard the master and first and second officers with two of the crew.

So long as any officer of a vessel is on board, and not disabled, there can be no suspension of the executive authority of her internal government. Therefore, at this crisis, the command legally devolved, at once, upon the third officer. He, however, did not assume it, but was for some time fully and usefully engaged in securing the forward hatches, or in superintending the securing of them. The fourth officer had been previously disabled, and was not on duty. The wheel was fully and

properly manned, and this was at no time otherwise. But there was no officer of the deck surviving, and there was urgent necessity for such an officer to give directions to the men at the wheel. It was a crisis of great peril. There was, at all events, great seeming danger; and it would now be mere idling to inquire speculatively how far actual danger may really have existed. The after-born supposed wisdom from such a retrospect might be arrogant folly. There certainly was also great alarm, with ample supposed cause; and a general panic, if not prevented, might have soon ensued; and this might, in its consequences, have been dangerous if not disastrous.

At this crisis the libellant intervened meritoriously. He was on board simply as a passenger, who, as such, had paid his fare. He was a competent professional master navigator, with former experience in the command of sailing vessels and of steamers. He went to the wheel-house and promptly assumed command or direction there, doing whatever was necessary and proper for the exigency. He thus averted, until the termination of the storm, whatever danger may have been caused by the unfortunate loss of the master.

I think that this was a salvage service. The difficulties in the way of so deciding are great. But those in opposition to a contrary decision would be greater. It is true that when the third officer succeeded of right to the command of the vessel, he might have ordered the libellant to take the watch during the emergency. The libellant would certainly have been compellable to go to the wheel-house. If he had been directed when there, to act as officer of the deck, it would, I think, have been his duty to obey, and to execute the office to the best of his ability. Had he done so, under such orders, I do not, as at present advised, think that it would have been a salvage service. But, without orders, he was not compellable to decide who should have the watch, or to take upon himself the direction, with its cares and responsibilities.

At the crisis of danger there was no means of organizing the internal government of the vessel, unless through immediate energetic action of the third officer. That officer did not thus act. The libellant was, therefore, justifiable, under the law of maritime necessity, in acting upon his own responsibility, as officer of the deck. There was, at this time, therefore, no usurpation of unlawful authority by him. This being so, his conduct thus far was meritorious and highly beneficial; and the service was, under the circumstances, extraordinary. It was a peculiar service for one who was not of the crew to take the command of the watch without being assigned to it.

On the next morning, the storm having ceased or abated, and no special danger continuing to exist, the chief engineer and the purser, and some others on board, without consulting the third officer, whose authority alone they should have recognized, wrongfully assumed upon themselves to offer the command of the vessel to the libellant, and urgently invited him to assume it as master. He very improperly did so. He did not consult the third officer, but nominated him as first officer. It is contended that the third officer acquiesced in what would thus otherwise have been a usurpation. An English judge has recently said that quiescence is not acquiescence. Mere enforced submission certainly is not. The third officer here submitted, but did not acquiesce.

The libellant continued to act in this usurped relation of master of the vessel for several days, until she reached the port of destination.

On her arrival, the owners, who are here defendants, gave thanks, in writing, to the libellant, as for extraordinary services, and offered him what would have been a liberal gratuity for meritorious conduct if he had been an officer of the vessel. But the amount offered was greatly below the least possible estimate of compensation for a salvage service.

He now alleges that he became of right master of the vessel, and thus rendered a continuing salvage service. This unfounded pretension is, of course, rejected.

The question then arises, whether through his usurpation of the command of the vessel after the storm, he has incurred a forfeiture of the salvage compensation to which he was otherwise entitled for his prior service.

I do not think that under the peculiar circumstances of the case, an absolute forfeiture of the whole amount was incurred retroactively by his assumption and exercise of the illegitimate authority. But the effect of this usurpation must necessarily be to reduce very materially the amount which would otherwise be awardable to him.

What the reduced amount ought to be is not easily determinable. I have hesitated between three thousand and four thousand dollars, and have determined on the greater sum, partly because I think that the defendants' letter of thanks almost invited the litigation which has followed, and, though not so intended, must have induced a high estimate by the libellant of the value of the service.

Costs are adjudged to the libellant; but under the head of depositions, taxable costs will not be allowed to an amount exceeding two hundred dollars. The testimony is of great bulk, but of no proportionate weight; and its excess in bulk ought not to be allowed to swell the costs.

Decree for libellant for \$4,000, provided that, under the head of depositions, costs exceeding two hundred dollars will not be taxed or allowed.

Rufus E. Shapley and Charles M. Neal, Esqs., for libellants.

Morton P. Henry and Theodore Cuyler, Esqs., for respondents.

Western District of Pennsylvania.

[Leg. Int., Vol. 31, p. 261.]

THE WARREN SAVINGS BANK *vs.* J. K. PALMER & CO. FIRST NATIONAL BANK OF WARREN *vs.* SAME.

Under the amendment to the 39th section of the bankrupt law, the debtor will be required to file a list of his creditors, and the amount of their claims, where an involuntary petition was filed against him since December 1, 1873, to which he had made a denial and a demand for a jury trial, and had since filed a demurrer.

Opinion delivered by

MCCANDLESS, D. J.—The Warren Savings Bank in one case, and the First National Bank of Warren in the other, filed involuntary petitions in bankruptcy against the respondents, J. K. Putnam & Co.

Both were filed since the 1st of December, 1873. In each there was a denial, and a demand for trial by jury, which was ordered at this

term. To these petitions, a demurrer was filed yesterday, the 20th of July.

This, in the language of the act, is a denial as to the requisite number of the petitioning creditors, and the amount of their claims, a denial as to the sufficiency of the one-fourth in number of the creditors, and one-third in value of the debts. Thus far in the progress of the proceedings in these cases, this would authorize the court to demand of the debtors a schedule of all their creditors, with the amount of the debts due to them respectively, to be rendered to the court forthwith.

Before the court had any opportunity to make the order in these cases, the creditors anticipated the action of the court, by asking leave to file a supplemental and amended petition, containing a sufficient number of creditors, as is alleged to perfect their case.

Thus far, this is all proper, and the court now, as it would have done if the amended petition had not been filed, orders the debtors forthwith to file a list of their creditors, as provided in the amendment to the 30th section of the bankrupt law, and in the meantime the petition filed by the creditors on the 20th instant, to remain on file for the information of the court.

District of New Jersey.

[Leg. Int., Vol. 31, p. 61.]

In re WILLIAM McCONNELL, BANKRUPT.

A manufacturer was adjudged a bankrupt, and the goods and chattels at the manufactory building were ordered by the court to be sold by the marshal, and the proceeds to be paid to the assignee, that should be afterwards appointed. A sale was made and the marshal paid over to the assignee \$2,166.74. The 4th section of the State landlord and tenant act secures to the landlord a preference over other creditors for one year's rent, from the proceeds of the sale of personal property on the demised premises. A subsequent law extends the same privilege to operatives in manufactories for one month's wages. In this case there was due to the landlord for one year's rent \$2,700, and to the operatives about \$1,800. The landlord proved his debt, including the rent, without naming his lien or security, and took part in the election of an assignee, as an unsecured creditor, and afterwards, on ascertaining his privilege, asked leave to amend the proof by setting forth his security. The assignee claiming that he ought not to be allowed to amend; or, if allowed, that the operatives were entitled to be paid in full, one month's wages, in preference to the claim of the landlord. *It was held:*

1. That a creditor, having a lien, and proving his demand in ignorance of his privilege, without naming his security, should be allowed, in the absence of fraud, to amend his proof.
2. That it was not designed, by the 28th section of the bankrupt act, to give to the five classes of creditors there enumerated, any priority over secured creditors.
3. That by the State laws, landlords and operatives, in cases of this sort, stand on the same footing, and being equally favored, are entitled to the payment of their preferred claims *pro rata*.

Opinion delivered February 3, 1874, by

NIXON, D. J.—A petition in bankruptcy in this case was filed by creditors against the bankrupt, May 10, 1873. After adjudication, but before the appointment of the assignee, to wit, May 22, 1873, upon representation made to the court, on behalf of the creditors, that the personal property of the bankrupt was of a perishable nature and deteriorating in value, an order was entered directing the marshal in charge to make sale of the same, and to pay over the proceeds thereof to the assignee, when he should be appointed.

The assignee has received from the marshal, and holds for distribution, the sum of \$2,166.74, which is claimed by T. Edgar Hunt, the landlord of the bankrupt, for rent due to him from the bankrupt at the date of adjudication, for the premises on which was the personal property, at the time of the sale. By the contract between the parties the amount of rent for one year to May 1, 1873, due to the claimant, was \$2,700.77, for the payment of which he claims a lien and preference upon the fund in the hands of the assignee.

The bankrupt, at the date of the adjudication, occupied the premises as a manufacturer, and was engaged in the manufacturing business. He had in his employ a number of operatives, to whom he was indebted in various sums for labor.

It is also claimed that these operatives are entitled to a preference in the payment of their demands against the estate. (1.) By virtue of the first section of the act, entitled, "An act to secure to operatives in manufactories, and other employes, their wages," approved March 13, 1856; and (2.) By the provisions of the 28th section of the bankrupt act, subject, however, to the limitations in both of these acts.

1. *In regard to the claim of the landlord.*

The bankrupt act makes no provision for a preference in favor of the landlord; but in its administration, it is undoubtedly the duty of the court to recognize and enforce any lien which he may have by virtue of the State law: *In re Wynne*, 4 N. B. R. 23. By the 4th section of the act concerning landlords and tenants (Nix. Dig. 490), no goods and chattels are liable to be taken from demised premises by virtue of any execution, attachment or other process, unless the party at whose suit the process is sued out, before the removal of the goods from the premises, shall pay to the landlord all rent due, not exceeding, however, one year's rent. The warrant by which the marshal seized the goods and chattels in question, being a process, the landlord's lien existed at the time of the seizure, and, in the theory upon which the bankrupt law is administered, still exists upon the fund in court, unless he has done something to waive or avoid his preference.

But it is insisted, in behalf of the assignee, that the landlord has waived his lien or security by making proof of his whole demand against the estate, as an unsecured claim.

It appears that the 9th day of June, 1873, was the time appointed for the first meeting of the creditors for the election of an assignee; that the claimant made proof of his debt before E. R. Bullock, Esq., U. S. commissioner, on the 6th day of June, for \$3,164.13; in which was included his claim for rent and interest thereon, amounting to \$2,975.86; that he claimed the whole sum as unsecured creditor, alleging in his proof, that he had not received any satisfaction or security whatever, for any portion thereof, and that he filed this proof with the register, at the time of the election of the assignee, and participated as an unsecured creditor, in the said election.

It also appears in the evidence that the claimant has had conversations, not only with the marshal at the time of the sale, but with the assignee at various times since his appointment, in reference to a lien which he had, or ought to have upon the goods, for the payment of this rent; that these conversations, however, were rather suggestions on his part that he

should have a lien, than a claim that he had such right. He testified, that except these general talks on the subject, he never claimed of the assignee any preference as landlord, until after he employed Mr. Shreve, as counsel, in October, 1873.

It further appears that there is nothing in the case which in the slightest degree impeaches the good faith of Dr. Hunt. He seems to have acted throughout, in ignorance of his privilege, as landlord, and this ignorance arose either from his not making the proper inquiries in regard to his rights, or from being misled by those upon whom he relied for information.

Under the circumstances, it becomes an interesting question, whether in deference to the claims of the unsecured creditors, the court must hold these acts or omissions of the claimant to be a waiver of his security, or whether he should now be permitted to withdraw or amend his proof, and take the fund in satisfaction of his claim, as the landlord of the bankrupt?

The general rule of law unquestionably is, that a proof of debt by a secured creditor, without reference to the security, and without apprising the court of its existence, is a waiver and relinquishment of the security: *Stewart vs. Isador*, 1 N. B. R. 485; *In re Bloss*, 4 Id. 147; *Wallace vs. Conrad*, 3 Id. 41; *In re Stansell*, 6 Id. 183.

This result is supposed to spring necessarily from the nature of the transaction, and because the creditor, by such proof, perpetrates a fraud upon the rights of the general creditors. The object of the proof is to enable him to have a voice in the selection of an assignee, and to participate in the dividends of the estate.

A secured creditor cannot vote, nor can he share in the dividends, until the value of his security or lien has been ascertained and he has proved for any excess of his demand, above its value. By proving for his whole debt and concealing his security, he puts himself in a position to have equal dividends with the other creditors, although he may also receive payments, in whole or in part, from the property, on which he has his lien.

But it is a familiar principle, that when the reason of a rule ceases, the rule itself does not apply. Was any such fraud intended, or could it result in the present case? The claimant does not insist upon his lien, and at the same time asks that his proof may stand. As soon as he is advised that a mistake has been committed in putting in his proof, he asks to withdraw or amend it, in accordance with the requirements of the act. Why should he not be allowed to do so? Who has lost any rights by his mistake or been misled by it? His lien existed when the petition in bankruptcy was filed and the petitioning creditor knew, or ought to have known, that the interests of the general creditor in the estate were in subordination to his claim for rent, as the landlord of the premises.

The only privilege resulting to the claimant, by filing his proof without referring to the lien, was, that he took part in the election of an assignee. My first impression was, that this ought to preclude him from being allowed to amend his proof. But there is no evidence that he gained any advantage thereby, or that the other creditors have been in any wise prejudiced in consequence of it, or that the claimant was

influenced by any fraudulent intent in thus proceeding. In the absence of proof it is the duty of the court to presume that none existed.

The general rule above stated that a proof of claim, without naming the security, is an implied waiver or relinquishment of the security, has long been recognized in the administration of bankruptcy estates in England, and it is founded upon the presumption of fraud in the creditor. The cases of *Ex parte Solomon*, 1 Glyn & Jameson, 25; *Ex parte Downes*, 1 Rose, 96, and *Ex parte Hornby*, Buck, 351, are generally relied on to sustain the rule. But in a subsequent case pending in the Exchequer, *Grurgeon vs. Gerrard*, 4 Young & Collier, 119, where this broad position was urged by the counsel in the argument, Maule, J., in delivering the opinion of the court, said: "Whether on application to the Court of Review, the assignees [in bankruptcy] may be able to make out a case, which may induce that court to order the bank to deliver up their securities, is a matter on which it is not for us to speculate. Great jealousy is properly felt, on the part of those who exercise jurisdiction in bankruptcy, against permitting parties who have proved on the footing of holding no security, afterwards to withdraw their proof and set up a security. But where, as in this case, the proof has obviously been made in ignorance of the existence of the security, it is highly probable that the court would grant relief."

Under the bankruptcy act of 1841, Judge Randall, of the District Court for Eastern District of Pennsylvania, in *Ex parte Harwood*, Crabbe, 496, allowed a creditor to withdraw the proof of his debt, it appearing that under a mistake of the law, he had proved for the full amount of his demand without deducting the value of his security. In delivering his opinion, he said: "In this case there was no concealment and there is no allegation of fraud. Nor is it pretended that the creditor elected to surrender his securities, and come in on the estate for a dividend of the general assets. . . . The proof having been made for the full amount of the creditor's demand, without deducting the value of the security, as should have been done, and this appearing to be through mistake, the creditor has leave to withdraw his proof of debt."

And under the present bankruptcy law, Judge Jackson, of the District Court of West Virginia, *In re Brand*, 3 N. B. R. 324, reached the same result: "The action of the creditor in the case," he said, "presents the naked question, whether being ignorant of his legal rights, he shall be held to intend what his acts would seem to imply. I think not. It is manifest from his affidavit, that his object was to give the assignee notice of his claim, and it evidently did not occur to him, that in doing so, he would waive any legal right. His action merely showed a want of familiarity with the provisions of the law. This fact should not operate to his prejudice, when we know that much diversity of opinion exists in the courts as to the true construction of some of its most important provisions. For the reasons assigned, I am not disposed to require a creditor, who inadvertently or ignorantly proves his debt, unaccompanied with fraud, to surrender his lien and participate in the general distribution of assets, but feel inclined to permit a creditor under such circumstances, if he elect to do so, to withdraw the proof of his debt and rely upon his security."

Without multiplying authorities, I am of the opinion, that there is

no proof of fraud on the part of the claimant, that should constrain the court to refuse to allow him to amend his proof in conformity with his rights in the estate at the time of the adjudication, and that his mistake in the premises ought not to be held to discharge his lien.

II. But the case does not end here. The net proceeds of the sale of the goods and chattels amounted to \$2,166.74. The rent due to the claimant is ascertained to be \$2,700.78, which will more than absorb the fund in the hands of the assignee. It appears that there is also due to the laborers and operatives, for work and labor in the manufacturing establishment of the bankrupt, about \$1,800; and the counsel of the assignee insists that by the 28th section of the bankrupt act they are entitled to a preference over the landlord.

But I think he has misapprehended the provisions and intent of the section. It creates preferences in the distribution of the bankrupt's assets, and states the order of payment to be observed by the assignee. It does not refer to any part of the estate derived, as in the present case, from the sale of property, on which creditors may have a specific lien. If the assignee has any distribution to make to the general unsecured creditors, he must take notice that this section enumerates five classes of creditors, who are to receive their claims in full, in the order stated, before any dividend is declared; the fourth class being to operatives, clerks or house servants, who are to be paid an amount not exceeding \$50, for labor performed within six months next preceding the first publication of the notice of the proceedings in bankruptcy.

It is further insisted that the operatives and employés are entitled to be paid out of this fund, to the extent of one month's wages, in preference to the landlord, by the provisions of the first section of "the act to secure to operatives in manufactories, and other employés, their wages," passed by the Legislature of New Jersey, and approved March 13, 1856.

The first section provides, that no goods or personal property, belonging to any manufacturer, or other person or corporation, shall be liable to be removed by virtue of any execution, attachment, or other process, unless the party at whose suit the process was issued shall first cause to be paid to the operatives, mechanics and other employés of the manufacturer, person or corporation, the wages then owing to them, provided the same shall not exceed one month's wages.

The second and only remaining section makes provision for their subsequent payment, if the officer holding the writ should in fact remove the goods without first making the payment required in the first section. The phraseology of the two sections is so strikingly similar to the 4th and 5th sections of the act concerning landlords and tenants, that the conclusion is irresistible, that the former was copied from the latter. What was the intention of the Legislature in passing the latter act? Did they mean to give to operatives and employés a preference over the landlord, in the payment of a month's wages, or did they mean to put them upon the same footing? If the former, then the last enactment must be held to repeal *pro tanto* the sections which secure to the landlords a privilege over other creditors. But no repealing clause occurs, and repeals of statutes by implication are not favored by the courts. It was said by the Supreme Court, in *McCool vs. Smith*,

1 Black, 459, that one statute is not to be construed as a repeal of another if it be possible to reconcile the two together. And Dwaris, in his Treatise on Statutes, 154, of the American edition, says: "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter, and the repugnancy such, that the two acts cannot be reconciled; for then, *leges posteriores, priores contrarias abrogant*. The leaning of the courts is so strong against repealing the positive provisions of a former statute by construction as almost to establish the doctrine of no repeal by implication."

In the absence of repealing words, and where an apparent conflict arises between the new law and the old, it is the duty of the court, if possible, to give such a construction to their provisions, that both may stand. This can only be done in the present case by holding that the Legislature intended to give to the operatives and the landlord a preference over all other creditors, and at the same time to put them on an equal footing as to each other, and where the goods and chattels are not of sufficient value to pay both of these classes in full to allow them to share the proceeds *pro rata*.

It is therefore ordered that a reference be made to the register to ascertain the amounts due to the operatives, not exceeding in any case one month's wages, and not allowing interest after the date of adjudication, and that the assignee distribute *pro rata* the fund in hand to the claimant and to them, according to the proof of their respective demands.

As no diligence has been manifested, either by the landlord or the workmen, to assert their lien upon the goods and chattels in question, and as the bankruptcy proceedings have been carried on by the assignee, in ignorance of their intention to claim a preference, it may be proper to first deduct from the fund, at least a portion of the costs and expenses of the proceedings. But no order can be made in the matter until the court is better advised respecting the condition and assets of the bankrupt estate.

E. Mercer Shreve, Esq., of Trenton, N. J., for the landlord.

John H. Voorhees, Esq., of Flemington, N. J., for the assignee and operatives.

[Leg. Int., Vol. 31, p. 293.]

H. E. FRENCH, MASTER AND OWNER, ETC., vs. THE SCHOONER VICTORIA.

The Hazel Dell and Victoria—two sailing vessels close hauled and having the wind on different sides—were beating up a narrow inlet against a head wind, when a collision took place. *Held*:

1. That by the 12th and 17th articles of the rules and regulations for preventing collisions (13 Stat. 58), it was the duty of the Hazel Dell—the wind on her port-side and being the overtaking vessel—to give way and to keep out of the way of the Victoria.
2. That whilst by the 18th article the Victoria, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger.
3. That the evidence brought the case within the principles of *The Maria Martin* (12 Wall. 31), and the damages, caused by the collision, should be divided equally between the libellant and respondent.

Opinion delivered August 7, 1874, by

NIXON, D. J.—This is a libel *in rem* by Hiram E. French, master of the schooner Hazel Dell, for himself and owners, against the schooner Victoria, to recover damages for a collision.

The libel sets forth that on the 6th of September, 1873, at about 8 o'clock in the morning, the schooner Hazel Dell, in proceeding from the port of New York, in ballast, to the port of Tuckerton, New Jersey, entered the inlet of Little Egg Harbor; that the captain and all the crew were on deck and observed the Victoria with all her sails set sailing up the said inlet towards the Hazel Dell, and thereupon the captain and others of the crew called several times loudly to the crew of the Victoria and desired them to keep clear of the Hazel Dell; that although there was sufficient room for the Victoria to pass she kept on her course with the wind and tide, and with violence ran foul of and on board the Hazel Dell, breaking her boom, tearing her mainsail, and damaging her yawl boat; that at the time of the said collision it was impossible for the Hazel Dell to get out of the way of the Victoria, because she was properly on her way and on her starboard tack; had just gone about to avoid collision and had not gathered way; that there was room enough for the Victoria to steer clear of and pass by the Hazel Dell, and that the damage was caused by the captain of the Victoria not heeding their calls and making proper efforts to avoid the collision.

John Rose intervenes as owner, and answers, acknowledging the collision at the time and place stated in the libel, but alleges that it occurred without fault of those in charge of the Victoria, and entirely from the negligence and unskilfulness of those in charge of the Hazel Dell. He states the collision to have occurred as follows: The schooner Victoria was beating up Little Egg Harbor inlet, at or about 8 o'clock in the forenoon of the sixth day of September, 1873, and having both the wind and tide ahead or adverse. The schooner Hazel Dell entered the inlet after the Victoria, and sailed up the said inlet astern of her. The Victoria having reached a very narrow place in said inlet known "as the point of soda," where the channel is about two hundred feet wide, was sailing across the same, having her port-tacks aboard (that is to say, heading towards the right hand side of the channel on her way up the same), and was close hauled to the wind when the Hazel Dell sailed close up to her under her port-quarter, and thereby forced the Victoria to go almost aground before changing her tack in order to avoid a collision with the Hazel Dell head on; that the Hazel Dell, after thus driving the Victoria almost ashore, and when it became necessary for the Victoria to go about to avoid going on the breakers, which were at that time right under her bows, did not change her course as it was her duty to do, but kept on the same and came nearly abreast of the Victoria on her port-side, and so close to her as to leave no room for the Victoria to turn without coming foul of the Hazel Dell. Those in charge of the Victoria being in this perilous condition in which they were placed entirely by the fault of those navigating the Hazel Dell as aforesaid, took all the precaution possible to avoid a collision consistent with safety to their vessel, and went about, put the helm hard to starboard, and endeavored to avoid a collision by letting the Victoria pay off before the wind and go clear of the Hazel Dell and astern of her,

but the Hazel Dell having placed herself in the position above described, it was impossible for those in charge of the Victoria to avoid a collision of the jib-boom of the Victoria and the after lash of the mainsail of the Hazel Dell.

I have carefully examined the testimony taken, and am of the opinion that if the captain of the Victoria when he first became aware of the danger of a collision had put his helm a starboard, slackened his peak and raised his centre board, he would probably have passed to the stern of the Hazel Dell; and that the collision occurred because he kept his course too long before he tried that method to avoid it. I am further of the opinion that if he had put his helm hard a lee and brought the Victoria into the wind, no damage would have been done.

The case, therefore, turns upon the single question whether the Victoria was entitled under the circumstances to hold her course.

And this question is determined by the provisions of an act entitled "An act fixing certain rules and regulations for preventing collisions on the water," approved April 29, 1864, 13 Stat. 58, and which was only the adoption by Congress of the "rules and regulations," promulgated by order in council, January 9, 1863, issued under and by virtue of the British "merchant shipping amendment act" of 1832.

The articles applicable to this case are the 12th, 17th, 18th and 19th; the first and second named referring to the duties of the Hazel Dell; the third to the Victoria, and the last, under special circumstances, to both.

The 12th article prescribes, that "when two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port-side shall keep out of the way of the ship with the wind on the starboard, except in the case in which the ship with the wind on the port-side is close hauled and the other ship free, in which case the latter ship shall keep out of the way."

I find no evidence to bring the case before me within the exception.

Both vessels were close hauled, beating against the wind, in a narrow channel, were crossing so as to involve risk of collision, having the wind on different sides, and the Hazel Dell having it on her port-side.

By the 17th article "every vessel overtaking any other vessel shall keep out of the way of said last mentioned vessel."

Both parties admit that the Hazel Dell was the overtaking vessel; that she entered the inlet some time after the Victoria, and was about passing her when they came in contact.

By the express terms of both of the above articles, it was undoubtedly the duty of the Hazel Dell to give way, and to keep out of the way of the Victoria. It was not for her to assume that the Victoria would change her course, for the 18th article says, "that where one of two ships is to keep out of the way the other shall keep her course, subject to the qualifications contained in the 19th article." The rule of the road did not oblige, or even allow her to change, unless it became necessary in order to avoid immediate danger.

The Hazel Dell, therefore, is not entitled to any compensation for the damages which resulted from the collision, unless it can be made to appear that there was something in the relative situation of the vessels, and wilfulness or want of skill in the management of the Victoria,

which contributed to the accident, and which takes the case out of the general rules and brings it within the provisions of the 19th article.

That article is in the nature of a proviso to save special cases, and prescribes that in obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rule necessary in order to avoid immediate danger.

What is the correct interpretation of this article? Does it mean that when any special circumstances exist rendering a departure from the rules necessary in order to avoid danger, the parties *may* or *must* depart from them?

If it were an open question in this court I should be inclined to say that it was a privilege accorded and not a command to be obeyed; that it allows either one or the other of the parties, in those emergencies, where adherence to the rules must result in collision, to depart from them, and to adopt such methods as good seamanship would suggest, to escape the imminent peril, but that even in such cases no obligation rests upon the party not in fault to depart from the rules in order to avoid what seemed at the moment to be the certainty of a collision.

And I find on examination that I am sustained in this view by Dr. Lushington, in the case of *The Eliza* vs. *The Orinoco*, reported in Holt's Rule of the Road, 98. In his address to the Elder Brethren, after quoting the 19th article, he said: "Now, according to my view of that section, it is an exemption of persons who would otherwise be under obligations to obey the previous sections. In omitting so to do, viz., the effect of it would be this, that though they were directed to keep their course, yet if there was imminent danger, they would be justified in not keeping their course, provided they had a chance thereby of avoiding the certainty of a collision. But it does not appear to me this is a directory section at all, that tells parties they are to do this or that, or anything else: but they are released from the severe obligation of complying with all the terms of the previous sections, and they are released from that obligation by circumstances which would render obedience to them conducive to peril, while by deviation, they might escape from that peril."

But this does not seem to be the construction given to the article by the Supreme Court. It was held in the case of *The Maria Martin*, 12 Wall. 31, that even flagrant fault committed by one of two vessels approaching each other from opposite directions, does not excuse the other from adopting every precaution required by the special circumstances of the case to prevent a collision.

Mr. Justice Clifford delivered the opinion of the court affirming the decree of the Circuit Court, which had divided the damage equally between the libellant and respondent on the ground that both parties were in fault, and as illustrating his view of the meaning of the 19th article he said: "Errors committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances to prevent a collision, as the act of Congress prescribes that in obeying and construing the prescribed rules of navigation due regard must be

had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger."

Accepting this as the meaning, the only remaining inquiry is, whether the *Victoria*, although entitled to keep her course by the 18th article, was nevertheless inexcusable because she did not depart from it under the pressure of impending peril? She did depart from it at the last moment, but procrastinated too long to keep from coming in collision. When at the distance of about thirty or forty feet, and when, as the captains of both vessels agree, there was a certainty, without a change of course, of striking the *Hazel Dell* about midships, the helm of the *Victoria* was put to the starboard, whereby she bore away aft of the hull, but came in contact with her yawl boat and the end of her main boom, breaking the latter and tearing the mainsail. If this action had been taken sooner it is probable that she would have passed to the stern of the *Hazel Dell* and avoided her altogether.

But that was not the departure from the rule which it seems to me good seamanship demanded. Why was not the *Victoria* put in stays? That was the most obvious movement which the circumstances of the vessel suggested.

The case really appears to be this: that the captain of the *Victoria* knew enough of the rules of the road to know that he was entitled to his course, and that it was the duty of the *Hazel Dell* to keep out of the way. He had the slower craft, which is always an irritating fact to an ambitious captain, and he resolved in his own mind not to yield an iota of his strict legal rights to his more fortunate rival. This resolution was adhered to in the face of immediate danger, and until the collision was inevitable.

According to the principle of *The Maria Martin*, supra, he ought "to have adopted every proper precaution required by the special circumstances to prevent a collision," without reference to the ordinary rules of navigation, and I think he came short in this respect in not porting his helm and bringing his vessel into the wind.

I have not overlooked the reasons which the captain of the *Victoria* has given for not doing so, viz., that he was so near the shore that there was danger of his getting on the breakers.

The weight of the testimony was against this view of their situation.

He acknowledged that he had gone about and had run at least two or three lengths of his vessel before the collision took place. Other evidence located them nearer the middle of the channel. But considering the daylight, the calm weather, the state of the wind and of the tide, there appears from his own admissions, room enough to have brought the *Victoria* in stays without peril. It hence results that the owner of the *Victoria* should equally divide the damage caused by the collision with the *Hazel Dell*, which was also in fault.

This view of the case renders it unnecessary for me to consider whether the claim of the respondent for damage for the detention of his vessel should be allowed. That question will properly arise when the defence prevails, and when the judgment of the court fixes no blame on the management of the defendant's vessel.

A. Flanders, Esq., of Mount Holly, for the *Hazel Dell*.

Elias L. Boudinot, Esq., of Philadelphia, for the *Victoria*.

Court of Common Pleas, Philadelphia.

[Leg. Int., Vol. 32, p. 12.]

EXCEPTIONS TO AUDITORS' REPORT IN THE MATTER OF THE 381 TRUST.

1. The trustees of the *aggregate fund*, being the legal holders of the notes, payment whereof was intended to be secured by the 381 *trust*, are entitled to the balance in hands of the accountant.
2. The claims of Morris & Nicholson's representative are settled in *Halsey's Appeal*, adversely to the claimant, because Morris & Nicholson never paid Greenleaf for the shares, and cannot acquire an equity upon presumption of payment from lapse of time. If such payment could be shown to have been made by Morris & Nicholson, it would be otherwise.

Opinion delivered *January 2, 1875*, by

ALLISON, P. J.—We have before us the original and supplemental reports of the auditor in the 381 trust, both of which are excepted to.

The contest waged is over a fund of \$42,348.48, which is claimed by the Pennsylvania Company for the Insurance on Lives and Granting Annuities, as substituted trustee, under an indenture of four parts, called the aggregate fund deed, dated the 26th day of June, 1797. This claim is resisted by the representatives of Morris & Nicholson, and those who claim under them, and by the administrators *d. b. n.*, of Thomas Mayne Willing, and Thomas Willing Francis, the holder of \$257,000 of drafts secured by the 381 trust, and by owners of shares in the North America Land Company.

The present fund arises wholly from the proceeds of one kind of collateral, to wit: 6,119 shares in the North America Land Company, assigned by James Greenleaf, for the use of the holders of certain notes specified in schedules D. E. L. and G., of the 381 deed. In the settlement of the estate of that company these shares were awarded to the 381 trust.

We do not propose to restate in detail the history of the North America Land Company, founded on the 20th day of February, 1795, by Robert Morris, John Nicholson and James Greenleaf. Suffice it to say, that the capital of the company in the articles of the association is represented as consisting of 6,000,000 of acres of land, represented by 30,000 shares of stock, every owner of a share to be a member of the company. Six per cent. dividends were guaranteed by Morris, Nicholson and Greenleaf, and to secure the fulfilment of this stipulation of the 23d section of the articles of association, each of them agreed to deposit 3,000 shares, making in all 9,000 shares.

The three parties to the articles of association failed from the first to carry out the obligations assumed by them; less than 4,500,000 acres of land were conveyed to the trustees, but the shares issued amounting to 22,365 were founded on this original basis of 200 acres to the share. This resulted in a corresponding reduction of the number of shares deposited to secure the six per cent. annual dividend.

On the 28th day of May, 1796, Greenleaf sold to Morris & Nicholson his entire interest in the company for \$1,150,000, one-half payable in negotiable orders drawn by Morris on Nicholson, to Greenleaf's

order, and the other half payable in orders of like character, drawn by Nicholson on Morris. It was, however, agreed that Greenleaf should not be required to transfer his shares thus sold, until the said orders were paid, and in point of fact they never were transferred to Morris & Nicholson, or either of them. Greenleaf, however, by himself and by his agents, pledged said orders for his individual benefit; a portion of them were assigned to George Simpson, in trust for the security of one Edward Fox, by indenture, dated September 30, 1796. This deed is known in the present controversy as the 391 deed.

On the same day Greenleaf executed another deed to the same grantee, as trustee, for the benefit of all persons holding or interested in said orders, which he had received from Morris & Nicholson. This is called the 381 trust; both these trusts taking their designation from the page of book in which they are recorded. By this last mentioned deed, the property recited therein, both real and personal, was to be held for the security of the orders of Morris & Nicholson, including shares of the company agreed to be delivered by Morris & Nicholson to Greenleaf, to secure their notes and obligations, with power of sale on the non-payment of any of said notes, and the duty of applying proceeds of such sales to the discharge of such obligations.

The notes were not paid, nor were the shares of Greenleaf transferred, who, on the 8th of March, 1797, by several assignments, conveyed to the successors of George Simpson, under the 381 deed, 2,545 shares of the company, the balance of the 10,000 shares to which he claimed to be entitled, for which shares certificates had not been issued, subject to the conditions and appropriations contained in the 381 deed.

By other assignments of same date, he transferred to the same trustees, 2,485 shares, the one-third part of 7,455 shares, which had been transferred to Thomas Willing and others, in trust to secure the payment of the six per cent. dividends to the members of the company. These transfers were also made subject to the conditions and appropriations specified in the 381 deed. The whole number of shares transferred to Pratt and others, trustees, under the 381 deed, was 6,119, and thus matters stood until the 26th day of June of the same year, when the "aggregate fund deed" was executed by and between James Greenleaf, of the first part; Edward Fox, of the second part; Morris & Nicholson, of the third part; and Pratt and his associate trustees under the 381 deed, of the fourth part. A careful consideration of the contents of this deed is required in order to understand its true intent and meaning, and in order to arrive at a correct conclusion, as to the rights and duties of the several parties thereto, as well as of those who claim under or against the said deed. It first recites the indenture executed by Greenleaf, known as the 391 deed, and to avoid confounding it with the 381 deed, this explicit language is used: "And it is to be distinguished in this indenture, from a deed of the same date, from the same James Greenleaf to George Simpson, recorded in the same office, in same deed book in page No. 381, and which said last mentioned deed, and property therein mentioned, is not included herein, nor influenced in any degree, nor forms any part of this indenture." It then recites another deed of the 11th day of October, of the same year, executed by Greenleaf, conveying certain real estate, notes and acceptance to George Simpson,

upon certain trusts and conditions therein mentioned, and another indenture of four parts, dated in or about the 23d of March, 1797, by which the said Simpson conveyed to Pratt and his associates, certain specified real estate and notes, in trust for purposes set out in the deed. The fact is then stated that the parties of the fourth part are possessed of other notes and acceptances of Morris & Nicholson, indorsed by Greenleaf, *which they had purchased for the use of the trusts, in them reposed by the indenture from Simpson*: to forward the objects mentioned in the deed of Simpson to Pratt and others, Morris & Nicholson granted to Pratt *et al.*, the trustee aforesaid, lands and tenements, squares and parts of squares, and lots of ground belonging to Morris & Nicholson, in the city of Washington, District of Columbia, subject to subsisting liens: *In trust* to pay past and future costs of the several trusts; to pay the amounts mentioned in the deed as due to one Daniel Carroll, and to the commissioners of the city of Washington, and all notes and other engagements made by Edward Fox for Greenleaf, amounting to about \$900,000, together with the sum of \$4,725, paid by Pratt and others, named in the purchase of certain notes of Morris & Nicholson, for the benefit of the trust. The resulting trust was for the benefit of Morris & Nicholson.

These constitute all the uses declared in the aggregate fund deed, but there is inserted a clause, which, in the judgment of the auditor, is most material in determining the question before him, which was one purely of distribution, not one of absolute or ultimate ownership of the fund; this is true so far at least as the trustees of the aggregate trust deed are concerned, who can hold only for those who may be entitled to take under them, and the auditor has decided no more than this in awarding the fund to said trustees. The clause of the deed referred to is an agreement on the part of Morris & Nicholson, made with Pratt and his co-trustees, "that the several notes and acceptances hereinbefore mentioned, indorsed by James Greenleaf, and now held by them, or by any other persons for their use, amounting to \$831,500, a particular list of all which notes and acceptances is hereto annexed, shall be considered as real *bona fide* debts, of them the said Robert Morris and John Nicholson jointly and severally, without any plea of defalcation or set off, in law or in equity, and that all securities of every kind heretofore given by them, or either of them, for the securing the payment of the said notes and acceptances, or any of them, are hereby confirmed and made good and valid, to all intents and purposes, so far as the same relates to the said notes and acceptances, and no further." This is followed by a reservation of all questions of liability or indebtedness connected with said notes and acceptances, as between Morris & Nicholson and Greenleaf.

The auditor, in his first report, recognizing the fact that the present accountant is the true successor of the original trustee, under the 381 deed, awards the fund in dispute, being the proceeds of 6,119 shares of the North America Land Company, to the accountants, they having succeeded to the management of the aggregate fund trust, and this decision is founded upon the conclusion, that these 6,119 shares have been judicially awarded to this trust, and to the immediate predecessors of the accountant or trustees, upon a state of facts which have been judicially ascertained. This conclusion is grounded upon the case of *Morr's Appeal*, and *Halsey's Appeal*, 7 Wright, 23. The Supreme Court having

there decided that nothing short of a full compliance on the part of the claimants, Morris & Nicholson, or those who claim under them, to wit, payment of acceptances given for the purchase of the interest of Greenleaf, would entitle them to a decree for a specific performance, and that the agreement was in no sense a pledge of stock, to be recovered on proof that the debt for which it was pledged was presumed to be paid by lapse of time, or barred by the statute.

The auditor quotes from the opinion of the court which determines the legal relation of the parties in that transaction. "The only equitable right," say the court, "which Morris & Nicholson could have to demand the stock, must have arisen out of payment. Nothing less could have entitled them to specific performance. In fact, they never did pay; it is not pretended that they did, unless indirectly, through what is called the aggregate fund deed, and after a careful investigation, we have been unable to discover any evidence that the drafts were ever actually paid or in any manner satisfied."

The case stood before the auditor upon the same evidence, as that which was before the Supreme Court, and as to which the above opinion was expressed.

But in the above statement by the Supreme Court, the case does not seem to be put as strong against the claimants, under Morris & Nicholson, as it might have been; they seem to have at this point overlooked the most clear and positive admission of Morris & Nicholson, which appears in the clause last cited from the aggregate fund deed, in which a then present indebtedness of Morris & Nicholson, for \$831,500 of notes and acceptances, is most clearly confessed by them, and an admission that as to the holders of those notes, which are scheduled, they have no defence in law or in equity. Nor is it to be forgotten, that one of the principal objects to be accomplished by the creation of the aggregate fund trust, was to provide for the satisfaction of these very notes and acceptances, which were then held by the predecessors of the present trustee and accountant.

To the conclusion of the auditor awarding the fund in the hands of the accountants to the aggregate fund trust, exception is taken on various grounds, and by different parties. Much stress is laid on the clause of the aggregate fund deed, which excludes the 381 deed and property therein mentioned from the operation of the aggregate fund deed, but as we have seen by quoting the express objects to be accomplished by the creation of the latter trust to what it applied, this clause can be regarded in no other light, than as guarding by express terms of exclusion, the 381 deed from all benefit of the trust created by the aggregate fund deed. It is no more than declaring, that the property set apart in the aggregate fund deed, for certain specified objects, wholly separate and distinct from those which the 381 trust was created to secure, shall not be applied to the 381 trust. The mistake of the exceptants under this head of objection is, in supposing, that such is the effect of the award of the auditor, which is founded solely on the fact that the trustees under the aggregate fund trust, are the legal holders of the notes and acceptances, produced by them, to secure the payment of which, the 6,119 shares of stock were set apart by Greenleaf. For whose benefit they hold is another question, which can hereafter be raised at the proper

time, and in the proper forum. No presumption of payment of these notes arises from the fact that they are in the hands of the present accountants, who are trustees of the aggregate fund trust; this position is fully answered by the restatement of the fact, that when the aggregate fund deed was executed, Morris & Nicholson recognized the existence of the notes as well as their entire obligation to pay the same, and that they were as to the holders, the predecessor of the present accountants, wholly without defence.

It is also contended against the report, that certain of the exceptants have had no day in court; the auditor, J. A. Phillips, having dismissed their claim for want of jurisdiction, holding that the proper time to present it would be on the settlement of the present account of the 381 trust. The report of auditor Phillips was confirmed by the Court of Common Pleas, and this it is now contended has left them without a hearing upon the merits. But the whole case, including the voluminous testimony taken before the auditor, went up to the Supreme Court, and was fully considered in *Halsey's* and *Moss's Appeal*, 7 Wright, 23. No one who reads the lengthy and well-considered opinion in that case can doubt that it was considered in the court upon its merits; it is decided on no technical ground, but on the broad principle that the present exceptants are without merit; that they have no standing as claimants for proceeds of 6,119 shares of stock, until they prove actual payment of the notes, and this the Supreme Court say they have not done. The contract of May 28, 1796, is held to be not a sale absolute for notes, with a pledge of the shares as security, but an executory contract to sell, and is incapable of any other construction. The power of the Supreme Court to go into the merits of the questions as to which the auditor and court below had decided they were without jurisdiction, is denied; and all that that court have said, under this head, in *Halsey's Appeal*, is characterized as mere *obiter dictum*. We are invited in the argument submitted, to hold that the Supreme Court having no jurisdiction, its decision of the 381 trust is neither conclusive in law nor in fact, and is *coram non iudice*. To sustain this doctrine, counsel has cited 17 S. & R. 292; 2 Wright, 459; 1 Barr, 132; 2 Jones, 355. But we do not feel free to adopt this suggestion, and thus disregard the decision of the Supreme Court, and hold that it "can have no judicial weight with this court in now deciding the question." We prefer that the tribunal which decided *Halsey's Appeal* should themselves first adopt this view, if the reasoning pressed upon our consideration be well grounded. Several positions were taken before the auditor by the counsel representing Halsey, administrator *d. b. n.* of John Nicholson, deceased, which are stated by the auditor in his report to be: 1. Greenleaf, represented by the accountants, must make good to Morris & Nicholson the 10,000 shares which he sold to them, or restore to them their drafts. 2. He must pay them the \$25,000, which he agreed to pay by the articles of May 28, 1796, the same under which he agreed to sell all his interest to Morris & Nicholson, in the land company, for \$1,150,000, less \$4,738. 3. The trustee must account for the difference between 6,119 and 10,000 shares. The auditor does not in his report reply in detail to these several positions taken in behalf of the administrator of John Nicholson, deceased, but says, the various views pressed on behalf of Morris & Nicholson

seem to begin and terminate in what substantially amounts to a claim of performance by them, of the terms of the articles of agreement of sale between them and Greenleaf. But, that these had not been performance, was settled in *Halsey's Appeal*, and there has been no attempt to show the contrary in point of fact up to this time; all subsequent effort, if such has been made, has brought no fact to the front which even tends to show actual payment, and the Supreme Court have said that to set up a presumption of payment will not suffice. In further support of the views of this exceptant, an equitable ground is assumed; that Greenleaf, having taken to himself the benefit of the \$1,150,000 of notes, those claiming under him should be postponed to the claim of Morris & Nicholson, who have never derived one cent of profit from what they thus bought and paid for. But what did they pay? Promises which they never fulfilled; worth up to this hour to the holders just the value of the several pieces of paper on which they are written.

The answer to this position of this exceptant is, that if Morris & Nicholson claim an equitable enforcement of the agreement with Greenleaf, they must first do equity. There can be no enforcement of specific performance till the party asking relief shows performance, or the tender of it on his part. This is what the Supreme Court has already settled in this case as applicable to this very demand; recognizing the justice of this decision, we have neither the disposition nor the power to dispute or overthrow it. It stands in the way of this exceptant, so that he cannot advance a single step in furtherance of either of his propositions until he removes this barrier. To every demand which he may make, until this is done, the conclusive answer is, that as a condition precedent to the enforcement of a transfer of stock to you, you promised to pay your notes and engagements, and this you have not done; and the express agreement further was, that James Greenleaf was not to transfer until you did pay. Neither does the resulting trust, in favor of Morris & Nicholson, become effective until the notes which the stock was assigned to protect have been paid.

The auditor recognizes the claim of the trustees of the aggregate fund deed as the holders of \$676,500 of the notes produced by them, and rejects the claim set up by said trustees to other notes amounting to \$129,000, because they were neither produced nor shown to be in the actual or constructive possession of the claimants. In this we think he decided correctly, the recognition of these \$129,500 of notes in the deed of June 26, 1797, does not of itself show title in the trustees of that deed.

For the reasons stated by the auditor, we agree with him in the rejection of the claim of the administrator *d. b. n.* of Thomas Mayne Willing and Thomas Willing Francis. The auditor could not with the affidavit of Thomas W. Francis before him, taken before the commissioners named in the commission of bankruptcy, do otherwise than hold that the securities in the possession of Willing & Francis had been sold by them, and that there is not sufficient evidence to justify him in finding as a matter of fact, that the title to the acceptance was subsequently acquired by the firm.

Nor can we sustain the exceptions filed by certain shareholders in the North America Land Company, represented by Mr. Waln. The excep-

tion is, that the whole fund should have been awarded to the shareholders of said company, and not to the trustees of the aggregate fund trust; but if we understand the grounds upon which this claim is based, it is that the conditions on which the 381 trust was executed, never having been complied with, the property did not pass under the deed, and it should go to shareholders other than Morris & Nicholson, under the decision of the Supreme Court in *Halsey's Appeal*, 7 Wright, as to the effect of the covenant of guarantee. If this is the basis on which this claim rests, the decision in 10 P. F. Smith, which swept away this covenant, would seem to take from this claim all the support it ever possessed.

But the alleged non-execution of the 381 trust cannot avail to set that trust aside as far as Morris & Nicholson are concerned, and re-instate them in the position in which they stood before the 381 deed was executed. They subsequently became parties to the aggregate fund deed, which recognizes the existence at that date of the 381 deed, and the appropriation of property therein mentioned to the uses of that trust. It is too late to raise such a question as this after actual and presumed ratification by Morris & Nicholson, or to hold that by reason of an assumed non-execution of that trust, Morris & Nicholson, though reinstated, are to be postponed, to the other shareholders of the company.

These are all the questions which present themselves upon the first report of the auditor on the 381 trust; when they were first called for argument, and indeed after the argument had somewhat progressed, it was suggested that an appeal was pending in the Supreme Court upon exceptions to the decision of the Common Pleas upon the report of John M. Collins, Esq., auditor appointed to distribute the balance appearing on the second account of James Dundas, surviving trustee of the North America Land Company. It was agreed to by counsel, that the exceptions should stand over until the decisions of the Supreme Court should be made. After that decision had been announced, which is reported in *Ingersoll's and Dales' Appeal*, 10 P. F. S. 247, the following order was made: "It is ordered that this report (upon which we have just remarked) be remitted to the auditor, to enable parties supposed to be affected by the decision of the Supreme Court, to be heard, etc., without the court expressing any opinion upon the question whether the rights of the exceptants are affected by said decision." The whole case then went back to the present auditor, which opened before him for argument the questions upon which he had originally passed. The auditor, however, upon the making up of his second report, correctly construes the order of re-reference as raising before him the question intended by the court, namely, to inquire and determine whether or not, if the decision in 10 P. F. S. had been made before the conclusion of the audit, or the filing of his report, it would have had such legal bearing upon the subject before the auditor as to require a modification of the conclusions as stated, or the award as made by him. Resting on this conclusion, the auditor proceeded to examine *Ingersoll's and Dales' Appeal*, in order to ascertain what it is that is therein adjudicated, so as to reach a conclusion as to the effect of that decision upon the award which he had made in his first report.

Under the original articles of association, whereby the company was

constituted in 1795, the founders, as previously stated, agree that the dividends of the company shall not be less than six per cent. per annum in every year. For the payment of which, they made, as they supposed, ample provision, and made themselves personally responsible to make good any deficiency arising from the sales of land to secure the payment of the dividend of six per cent. to the shareholders. In *Halsey's and Moss's Appeal*, 7 Wright, 23, the Supreme Court in 1862 decided that this guarantee imposed an annually recurring obligation as long lived as the association itself. That as it was a fundamental article of the association, constituting a part of the original contract between the founders of the company and the shareholders, it was not avoided by long disuse and non-claim. In *Ingersoll's and Dales' Appeal*, the court held that the agreement organizing the company, provided for a change in the articles which was afterwards duly and properly made, and that the pledgors were not bound, unless it clearly appeared that they had agreed to transfer or carry over into the organization as changed, their original guarantee.

The power to effect a change in the articles of association, and the fact that they were materially changed by a vote of the shareholders, was overlooked by the court in *Halsey's Appeal*, 7 Wright, and it was there held that as Morris & Nicholson claimed under the original fundamental articles which included the six per cent. guarantee, they were bound thereby, and that by no act of theirs could they deprive those who obtained certificates from them, of the right to receive out of the funds of the company, the dividends which those articles assured to them.

This six per cent. guarantee clause having afterwards been decided to have no present standing in the case, the question presented itself in what manner does the last decision of the Supreme Court affect the questions which arose upon the report of the auditor under the 381 trust? The auditor makes reply to this inquiry, by saying that it nowhere appears in his report that in determining between the respective claims of Morris & Nicholson on the one hand, and the aggregate fund on the other hand, he was influenced by any considerations connected with the existence or non-existence or effect of the six per cent. guarantee clause. An examination of the report fully sustained this assertion. Nor does the opinion in 7 Wright rest upon this clause of the original agreement, but upon the fact of not having paid the notes and acceptances given to Greenleaf, who by the articles of sale of his interest in the company to Morris & Nicholson, was to retain his stock as security for the payment of the notes, and who afterwards assigned all his interest to secure his creditors. Until payment was shown, the resulting interest of Morris & Nicholson could not be made available to them, and indeed that they had no right or interest in the shares which they had agreed to purchase from Greenleaf until they paid their notes.

The agreement was but executory, with no right to call upon Greenleaf to transfer his interest in the company until they had complied with their obligation, and paid the notes and acceptances, which were the consideration for the agreement on the part of Greenleaf to transfer his stock. The court add to this statement the conclusion that if the

difficulty of which they had treated was out of the way, and upon which the decision rests, namely, an entire want of equitable or legal right, growing out of the fact that the notes still remained unpaid to the assignees of Greenleaf, it still would not avail to carry the stock to Morris & Nicholson, because the entire dividend on the 6,119 shares would be absorbed by debts due by them to the company, and in the claims of other shareholders under the six per cent. guarantee. This was but the statement of a fact which the court held would arise to defeat the claim of Morris & Nicholson, if the ground on which the decision is based was out of the way. It becomes unimportant, therefore, to this cause that the original six per cent. covenant would no longer avail to defeat the claim of Morris & Nicholson, unless the first and more material objection, non-payment of the notes, be also shown to be a mistake in fact or in law. If payment can even now be shown this difficulty will disappear, and Morris & Nicholson, resurrected in the persons of their legal representatives, will take the fund in controversy, but they cannot be allowed to take it on the mere presumption of payment, growing out of the lapse of time; for to allow this would be, as the court say in *Halsey's Appeal*, to present the case of a chancellor, moved to decree specific performance of one who had not complied with his engagements, but had remained quiescent until he had been discharged by lapse of time. The significant question is then asked, was ever such a foundation for an equity successfully set up?

For the reasons stated, we agreed with the auditor that the change of view taken of the six per cent. guarantee by the Supreme Court, does not affect the construction of the agreement of May 28, 1796, or the deductions from the evidence, in pursuance of which that court in 7 Wright, established the title of the 381 trust to the shares in question, as against the claim of title made in behalf of the representatives of Morris & Nicholson. Thus holding, we dismiss the exceptions and confirm both reports of the auditor.

Edward S. Lawrence, Esq., as counsel for John Nicholson, administrator.

E. Ingersoll, Esq., for John Moss, administrator of Robert Morris.

Edward Waln, Esq., on behalf of shareholders of North America Land Company.

Morton P. Henry, Esq., for administrators of T. M. Willing and T. W. Francis.

Charles H. Hart, Esq., for one of the heirs of Robert Morris.

J. W. M. Newlin, Esq., for J. C. Heylman, who claims under Robert Morris.

William M. Tilghman, E. Spencer Miller, and J. G. Johnson, Esqs., for the Pennsylvania Company, etc., accountants, and as trustees.

[Leg. Int., Vol. 32, p. 40.]

SNYDER vs. SNYDER.

In proceedings in divorce, if a subpoena is served on a person residing in Massachusetts, it is as good a service as publication of notice by advertisement.

Rule to show cause why the libel filed should not be dismissed and proceedings quashed. Opinion delivered *January 23, 1875*, by

BIDDLE, J.—The defendant objects, that residing in Massachusetts, the subpoena has been personally served upon him, instead of a publication of notice having been made by advertisement in a newspaper in Philadelphia. An advertisement is only a less efficacious mode of giving notice, and when the better plan is available and is resorted to, it is certainly no just cause of complaint. The act also says, that the subpoena is to be served on defendant "wherever" found, and although there might be an argument, in case there had been no personal service, that the word "wherever" referred to the limits of the State, yet where there has been actual service, the defendant is certainly estopped from objecting that the notice was not given in a manner in which it would have been less likely to have reached him.

This rule is discharged.

L. Hirst, Esq., for plaintiff.

I. N. Brown, Esq., for defendant.

[Leg. Int., Vol. 32, p. 40.]

CITY vs. HARBISON. SAME vs. BOIST.

In actions for penalties for violating ordinances, the essential parts of the evidence should be set forth.

Certiorari to Alderman Hibberd.

Certiorari to Alderman Massey. Opinion delivered *January 23, 1875*, by

PEIRCE, J.—These were actions for penalties for violating the ordinance of September 23, 1864, and its supplements, relating to nuisances.

The records in both cases are defective in not setting forth the evidence on which the judgments were given.

It is not necessary to set forth the evidence *in extenso*, but it has always been held that the essential parts or particular substance of the whole testimony should be set forth: *Commonwealth vs. Borden*, 11 P. F. Smith, 272.

Exceptions sustained and judgments set aside.

Joel Vanarsdalen, Esq., for exceptants.

[Leg. Int., Vol. 32, p. 40.]

SMITH vs. FETHERSTON.

When a defendant is summoned to appear at 1½ o'clock, it is error if the transcript sets forth that at 2 o'clock plaintiff appeared and defendant did not.

Certiorari to Alderman Kerr. Opinion delivered *January 23, 1875*, by

PEIRCE, J.—The fifth and sixth exceptions are sustained. The defendant was summoned to appear at 1½ o'clock P. M. The alderman

sets forth in his transcript, that at 2 o'clock P. M., plaintiff appeared and defendant did not. After hearing he gave judgment for plaintiff. *Non constat*, but that defendant appeared at half-past one o'clock, and the alderman was not there. And such is said to have been the fact. Even if it be the practice to wait half an hour for the parties, it was the duty of the alderman to be at his office at the hour named for the appearance of the parties. A defendant might appear at the hour named, and not finding the alderman there, leave; perhaps, not knowing of the practice to wait half an hour. For though he is bound to know the law, he is not bound to know the practice.

The judgment is set aside.

[Leg. Int., Vol. 32, p. 40.]

CLOUD vs. TATLOW.

When the plaintiff sues as a public officer, the character of the work done and materials furnished should appear affirmatively on the record.

Certiorari to Alderman Kerr. Opinion delivered *January 23, 1875*, by

PEIRCE, J.—This was an action brought “for work and labor done and materials furnished to defendant by plaintiff, sealer of weights and measures, authorized by law.”

If it were an ordinary action for work and labor done, the judgment could be sustained, but as the plaintiff sues as a public officer, who is entitled to compensation fixed by law for the services which he is authorized to perform, it should appear affirmatively on the record the character of the work done and materials furnished, that it may appear that the claim is authorized by law, and that the charge made for it is as directed by law.

As the right of the plaintiff to do the work and charge for it does not depend on the assent of the defendant, the record should show that his claim is within the law by setting it forth particularly.

Exceptions sustained and judgment set aside.

F. F. Brightly, Esq., for exceptions.

Court of Common Pleas, Philadelphia.

No. 1.

[Leg. Int., Vol. 32, p. 50.]

CARROLL vs. HICKES.

Equity will restrain a defendant from carrying on the business of horse-shoeing "in Germantown or its vicinity" when the defendant has entered into an agreement with plaintiff to that effect.

In equity. Opinion delivered *January 26, 1875*, by

BIDDLE, J.—This is an application for an injunction on report of master to restrain defendant from carrying on the business of horse-shoeing, in violation of the following agreement:

"Having this day sold my shop and lot of ground on Laurel street, in Germantown, in which sale is included the good will of the business, therefore I hereby bind myself under my solemn obligation, not to begin or carry on for my own benefit, or for the benefit of any other person other than the said Thomas Carroll, the horse-shoeing business in Germantown aforesaid, or in the vicinity thereof, so long as the said Thomas Carroll shall continue in the said business.

Witness my hand and seal this first day of February, A. D. 1865.

"DANIEL HICKES." [Seal.]

"Witness—ROBERT THOMAS."

The testimony in this case leaves no doubt on our minds, that the defendant is violating this agreement under a colorable pretext, and is now carrying on business within two squares of the plaintiff. The only question, therefore, is, whether under that state of facts he is entitled to the relief which he seeks.

Contracts in partial restraint of trade have been held good in law from the earliest times, and cases growing out of them are found reported in the Year Books. The agreement must, however, be for a consideration, and must be partial, either in respect to time or place. It need not be restrictive as to both. In *Hitchcock vs. Coker*, 6 Ad. & El. 438, the restriction was as to space, the time being unlimited, and it was supported by the court. The space must be within reasonable limits, and what these are depends somewhat on the nature of the trade or business. London and one hundred and fifty miles around it was held in *Bunn vs. Guy*, 4 East Rep. 190, to be a reasonable restriction on an attorney-at-law. In *Proctor vs. Sargent*, 2 Manning & Granger, 20, five miles from a certain point was held reasonable in the case of a milkman. And in *Rolfe vs. Rolfe*, 15 Simons' Chancery Reports, 88, twenty miles from a certain house in Cornhill was held a reasonable restriction on a tailor.

The phrase, "Germantown and the vicinity thereof," we do not think susceptible of quite as wide a signification as the defendant fears may be claimed for it. Philadelphia is in one sense certainly in the vicinity of Germantown; in fact, they are both within the limits of one corporation, but in the connection in which the word "vicinity" is used in this agreement, we should consider that it bore the sense only of "neigh-

boring country," and would not include the built-up portions of a vast city. If the agreement means to exclude the defendant from exercising his trade in what is popularly called the city of Philadelphia, it would scarcely do so by describing it as an adjunct of Germantown. The restriction then we find reasonable as to its limits. It is alleged further, that the agreement is without consideration and cannot be supported, the only apparent consideration being executed. It is an instrument under seal importing consideration, and is expressly stated to have been made contemporaneously with the sale of the premises and good-will, at which time sixteen hundred dollars were received by the defendant from the plaintiff. We regard it as a part of the same transaction and supported by the general consideration. It, in fact, simply made effectual the sale of the good-will. We can scarcely suppose the plaintiff would pay a valuable consideration for the good-will of a business locality, without putting some restriction upon the defendant's right to open a shop next door to him.

This appears to us, therefore, a proper case for the exercise of the equity power of the court, as the continuing violation of such an agreement could by no proceedings at law be restrained or suitably redressed.

The decree reported by the master we regard as rather more extensive and stringent than the facts justify; it will therefore be confined to enforcing the defendant from carrying on the business in Germantown and its vicinity hereafter, together with an order for the payment of the costs of this proceeding.

[Leg. Int., Vol. 32, p. 66.]

VILAS BANK vs. BULLOCK & al.

The name of a firm of special partners—"Bullock's Sons"—the special partners being brothers of the general partners, does not make them liable as general partners, the sign required by the act of 1868 being properly exhibited.

Rule for judgment for want of a sufficient affidavit of defence. Opinion delivered *February 15, 1875*, by

BIDDLE, J.—The question which arises in this case is, whether the partnership averred in the affidavit of defence was a general or limited one.

This is to be determined by an examination of our acts of assembly, under the provisions of which alone can a limited partnership be established.

It is contended by the plaintiff, that the act of 1836, which inaugurated the system in Pennsylvania, required by the 13th section (see P. L., page 145), that "the business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted without the addition of the word 'company,' or any other general term, and if the name of any special partner shall be used in such form with his privy, he shall be deemed a general partner." And that, although there have been two supplements to this act, one passed in 1865, and one in 1868, they only alter it in cases where there are more than two general partners, and that where there are two or less than two, the provisions of the 13th section of the act of 1836 are still in force. This argument is ingenious, and the law is, perhaps, susceptible of that construction, especially if we disregard the spirit of it. We think, however, that the Legislature intended to lay down for the guid-

ance of the business community a rule not so difficult of ascertainment as this, and we are, therefore, disposed to construe it in its more obvious meaning.

The law of 1836, in its 13th section, requires, as we have seen, that the names of all the general partners should appear in the firm-name, "without the addition of the word 'company' or any other general term." The means by which the public were to be notified as to who were the general partners was consequently the firm-name. It was only necessary to regard that. The Supreme Court, therefore, very properly, in *Andrews vs. Schott*, 10 Barr, 52, decided that this was a vital provision of the act, and that where, under it, one special and two general partners took the firm-name of Andrews & Co., the special partner was generally liable.

The evident awkwardness of these long firm-names induced the Legislature to say, by a supplement to this act of March 30, 1865, P. L. 46, "that where there are two or more general partners, the firm-name may consist of either two of such partners, with the addition of the words 'and company,' but said partnerships shall put up, upon some conspicuous place on the outside and in front of the building in which it has its chief place of business, some sign, on which shall be painted in legible English characters, all the names, in full, of all the members of said partnership, stating who are general and who are special partners." This provision, of course, destroyed entirely the importance of the firm-name. It was not material how many names were in it, for if they were not all in it, it could no longer be relied on. The provision, then, in regard to the sign became the important one, as that was required to furnish all the information regarding the constitution of the firm.

This act, however, required undoubtedly that where there were "two or more general partners," the names of two at least should appear in the firm-name. It was to correct this, which had now become an unimportant matter, that the supplement of February 21, 1868, P. L. 42, was passed. It enacted, "That the firm-name of any limited partnership may consist of the name of any general partner, with the addition of the word 'and company,' notwithstanding the name of such general partner may be common to him and any special partner; but the said partnership shall put up the sign required by the second section of the act approved the 30th of March, 1865, to which this is a supplement." In other words, it abandoned completely the idea that the firm-name was to be the test as to who were the general partners and reiterated the provision as to the sign, which was evidently to take the place of it for that purpose.

In the present case, there were two general partners, Joseph W. Bullock and Benjamin Bullock, and two special partners, George and James M. Bullock, who took the firm-name of "Benjamin Bullock's Sons." This, it is contended, made them all general partners. As under the act of 1868, we think, the sign of "Bullock & Company" would be perfectly good, we do not think the one adopted at all more indefinite, or less likely to excite inquiry. The presumption would be that there were at least two sons, and would naturally lead to an inquiry as to their names, which would be given in the sign. As the sign complied precisely with the provisions of the law, we do not see that the firm-name alone changed the character of the partnership.

The affidavit also alleges that the notes were taken with a full knowledge that Benjamin and Joseph W. Bullock were solely responsible therefor.

The special partners advanced one hundred and fifty thousand dollars, upon which they were to receive legal interest: "provided that the profits of the firm should be sufficient to pay so much." This, also, it is contended, made them general partners, as they participated in the "profits." The provision that they are to receive no interest on their money, unless there are profits to pay them out of, is certainly of no disadvantage to the creditors. If the provision was to pay them in any event, perhaps it might be. It was not paid or received as "profits," but as interest on money loaned. We cannot see the force of this objection.

The affidavit also contains an allegation that the indorsement was made in fraud of the firm, and not in the course of its legitimate business, which might, on a trial of the cause, justify putting the holder to proof of consideration.

For these reasons, the rule for judgment is discharged.

Newton Keim and George M. Dallas, Esqs., for rule.

John G. Johnson and Samuel Dickson, Esqs., contra.

[*Leg. Int.*, Vol. 32, p. 90.]

CITIZENS' BANK vs. KEIM.

A power of attorney to institute suit, executed by the president of a bank without authority from the board of directors, is not sufficient.

Rule to stay proceedings until sufficient power of attorney is filed.

The depositions showed that the directors had not authorized suit by any resolution; the charter directing that he shall recommend to the board such proceedings as may be requisite for the settlement of unpaid debts.

Opinion delivered *March 6, 1875*, by

ALLISON, P. J.—The question here is as to the authority of the President of the Citizens' Bank of Philadelphia, to authorize a suit in the name of the bank against an alleged debtor of the corporation.

Corporations, like natural persons, are bound only by the acts of their agents, done within the scope of their authority, and the assertion of a delegated power must be supported by proof in order to sustain the right to act for and in the name of a corporation.

It is true, that such delegation of authority will sometimes be presumed, and a body corporate held responsible for the acts done in their name; but, as a general rule, the authority or agency must be made to appear.

It is usual for charters of banking and insurance companies to prescribe who shall be the agent of the company for a particular purpose; and in such case the boards or persons specified, and they alone are, or can be, the agents of or represent the corporation. It is not unusual for the charter to contain a clause conferring express power on the directors to create all necessary agencies for carrying on the business of the corporation, but boards of directors are themselves but the agents of the cor-

poration, only so far as they are authorized directly or impliedly by the charter: 8 S. & R. 521. It follows that while the directors have not absolute power in the management of corporate business, or in the disposition of corporate property, yet their power is generally by express or implied grant to be ascertained, and is not to be confounded with the power of the officers or agents of the corporation, who usually act in subordination to and under direction of the managers. Where the charter does not prescribe the nature and extent of the authority given to the officers or agents to act for the corporation, it must be shown in the usual way, by proper proof of appointment, as it appears on the records or books of the corporation, containing an entry or resolution of appointment: Note 3, Angell & Ames on Corp. 267, ed. 1866.

The claim which is here set up is made by the president of the bank to appoint an attorney to institute and carry on this suit in the name of the bank. The proof is, that the directors never authorized him to employ an attorney, or to bring the suit; the minutes of the body establish this fact. And it appears that a restriction on the exercise of such a power is impliedly, at least, placed on the president by article 6th of the by-laws: his duty is defined to be, to have under his supervision all debts which may remain due and unpaid, and recommend to the board such proceedings as may be requisite for their settlement. The inference is, that the board has reserved to itself the power to institute and control all proceedings which may be necessary for the settlement and collection of the debts due to the corporation. This question does not, therefore, stand upon the precise ground on which it was supposed to rest. There is no necessity to look narrowly into the general power of a president of a bank to sue for the debts of the corporation. The authorities upon this point are conflicting. In support of the proposition affirming the right, counsel cited 2 Metcalf, 240; 9 Paige, 496; 5 Denio, 355; 2 Hill, 487; 5 Howard, 83. Defendant relied on 1 Cush. 507; 28 Cowp. 556; and 2 Barr, 318; Angell & Ames, 300, ed. 1866.

It having been made to appear by proof, that the board of directors never authorized the president to employ counsel, or to have suit instituted against the defendant, who is himself a director of the bank, and the by-laws reserving, as they do, this power to the board of directors, we must hold the letter of attorney signed by the president, to which he has attached the seal of the corporation, to be the individual act of the president, and not the authorized act of the corporation, and therefore imperfect and insufficient.

Rule absolute.

Theodore F. Jenkins, Esq., for plaintiff.

Pierce Archer, Jr., Esq., for defendant.

[Leg. Int., Vol. 32, p. 90.]

In the matter of the petition for the opening of GIRARD AVENUE and TWENTY-SECOND STREET through the grounds of GIRARD COLLEGE.

A road jury can properly consider all the disadvantages as well as advantages to the public in the opening of streets, and it was not improper for them, in this case, to consider the nature, character and purposes of "The Girard College for Orphans," whose grounds would be taken, and whether its usefulness would be impaired, and the benefits it confers on the public restricted.

On exceptions to report of the jury. Opinion delivered *March 6, 1875*, by

BIDDLE, J.—The first six exceptions to this report are the usual and formal ones, which will necessarily be determined by our opinion, upon the reasons set out more specifically in the ones which follow.

The seventh exception is in these words:

“Seventh. Because it manifestly appears by an examination of the evidence that the jury decided against the opening of said Twenty-second street, and did not report in favor of opening and straightening Girard avenue, on the ground or for the reason that such opening would be improper under the provisions of the will of Stephen Girard and existing legislation essential to the faithful execution of the trust therein created, or that said opening would interfere or be inconsistent with or was forbidden by such provision or legislation; whereas, their very appointment assumed a decision by the court that the opening of said streets would not interfere with or be inconsistent as to the provisions of the will of Stephen Girard, or existing legislation upon the faithful execution of the trust therein created.”

If this had been established to our satisfaction we would have no hesitation in setting aside the report of the jury. There are passages in the speeches of the counsel for the directors of the city trust which certainly favor the allegation that these considerations had been pressed upon the jury, and unless they are considered in connection with other passages, they would be conclusive of that fact. One of the counsel, however, in his opening address to the jury, says: “The Court of Common Pleas, upon the argument of this case, have decided that it is consistent with the trusts of Mr. Girard’s will, and with the existing legislation on the subject, that these streets shall be opened through the college ground, and therefore you must take the law from the court. You must disregard the contract contained in the act of March, 1832; you must disregard the act of 1846, and the act of 1868, and must consider it settled now and hereafter, for all time to come, that no law and no contract can protect the grounds of the college from invasion by streets opened through it. Such is the law by which you are bound. We do not agree with this view of the law, but our objections are not to be made now and here. You are not to reverse or impugn the decision of the court under which you are now acting.” This, it may be said, would not be calculated to induce the jury to give a very cheerful acquiescence in the views so laid down, but it certainly expresses their duty with sufficient clearness. The other learned counsel for the trust, in concluding his argument, says, “Now that I may do justice to the court, I have here the opinion, and I beg leave briefly to read a few extracts from Judge Finletter’s decision, in order to show you that of which your common sense probably satisfies you, that you have nothing to do with the matters which he examined. You have probably read this decision of his Honor, Judge Finletter, and if not, it is here for your inspection.”

This, of course, was put more strongly by the counsel for the petitioners, who read to the jury apparently the whole opinion of the court, as pronounced by Judge Finletter, so that it is not easy to conceive that the highly intelligent gentlemen who composed this jury were

misled as to their duty, although the counsel in other portions of their addresses made use of phrases not quite so clear in their meaning as those we have quoted.

The eighth and ninth exceptions may be considered together, and are in the following words:

"Eighth. Because the question submitted to the jury was, whether the necessities or convenience of the neighborhood, and the public, made it proper to open said streets, and not to question whether the nature of the trust in favor of the college under Stephen Girard's will, or the faithful execution of the same, or the convenience or advantage of said college, rendered said opening improper, and yet an examination of the evidence shows clearly that they decided against the opening of said Twenty-second street, and did not report in favor of opening and straightening said Girard avenue, because the nature of said trust and faithful execution of the same, and the convenience and advantage of the said college, rendered said opening important, and disregarded the overwhelming evidence, showing that the convenience and the necessities of the neighborhood and the public made it proper to open the said street.

"Ninth. Because the jury, notwithstanding the objection of the petitioners, admitted evidence tending to show the disadvantages which said opening would occasion the college, and the interference and harm to the execution of the trust in favor of said college, under the will of Stephen Girard, which said opening would cause, when said evidence was not proper, and should not have been heard upon the question submitted to the jury."

The right of eminent domain or inherent sovereign power gives the Legislature the control of private property for public use. For the right of property in every well-regulated community is subservient to the general welfare. This right is expressly given in the Constitution, Article I, section 10, and is recognized in numberless decisions: See *Pittsburgh vs. Scott*, 1 Barr, 315, etc. The questions generally to be determined in invoking this power are twofold: first, is the use a public one? and, second, is it so important to the public welfare as to justify the taking of private property for it? A public street is, of course, a public use, but before land can be taken from a private citizen to lay it out, a jury must be satisfied that the public welfare requires that it should be opened. The consideration, then, for the jury in this case, as in all such cases, is the public welfare. This is to be arrived at not from testimony showing that certain individuals would be benefited. They have no right to demand the land of their neighbor, even if they want to give it to the public. The public welfare, and not the private citizen, must require it, before, under the law, it can be taken from the rightful owner. The jury must take a broad view of the advantages and disadvantages which the opening of a street will cause to the community. If, in their opinion, the disadvantages will outweigh the advantages, it is their duty to refrain from taking private property for any such purpose.

Should the projected street run through an almshouse, an asylum for the blind, the deaf and dumb or the lame, and utterly destroy it, the injury which the public would sustain in the loss of such an institution,

and the large damages which the county would have to pay for its destruction, would surely be fair subjects of consideration for a jury. If, then, the destruction of such a building would be an element of consideration for the jury, anything which impaired its usefulness or rendered it less fit for the purpose for which it was constructed would also be. "The Girard College for Orphans" is certainly entitled to as much consideration for the benefit it bestows on the public as any of the institutions we have mentioned. No one certainly could place it on a higher ground than the petitioners themselves, for their counsel not only suggest, but strenuously contend, that it is so widespread in its benevolence and so catholic in its aims that the Legislature have a right to exercise on its behalf the right of eminent domain, and to clothe it with authority to take, for its own use, private property against the consent of the owners. It would seem idle to say, after that, that impairing the usefulness of such an institution would be no detriment to the public. The pagan moralists had no care for the poor; they called compassion the vice of the heart, "*Misericordia animi vitium est;*" but it is one of the great triumphs of Christianity that it has not only created funds for charitable uses but charity itself. Can one contend, then, with truth, in a Christian community, that property dedicated to such purposes, confers no benefit upon the public, which a jury can estimate, or which can stand for a moment in the way of opening a street?

It was well said by one of the counsel, that in a great city there must be an "adjustment of different interests, so that the whole shall contribute to one end." Without these considerations are regarded, it is impossible to have a great city. It cannot be reduced to the regularity of a chess-board without destroying parks, public squares, and every large institution requiring for its development more than a square of ground. While a citizen may require reasonable access to his property, it is impossible that it should be given to him always in a mathematically straight line.

We think, therefore, it was properly left to the jury to consider all the disadvantages as well as advantages to the public in the opening of these streets, and among the disadvantages it was not improper for them to consider the nature, character and purposes of "The Girard College for Orphans," whose grounds would be taken, and whether its usefulness would be impaired, and the benefits it confers on the public restricted.

In *re Public Road* in Whitmarsh and Springfield townships, Montgomery county, 5 Barr, 101, the Supreme Court reversed the decision of the court below, fixing the width of a public road, on the ground that the public could be accommodated with a road of less width, which would do less injury to private property. In that case it was the regard due to private property upon which the court overruled the jury and the court below, it being shown that the public benefit would be more than balanced by the injury to the dwelling-house and mill-race of a private citizen. It shows how clearly it is the duty of the jury to consider, not only all public, but all private interests, which can be benefited or injured by their action.

The tenth and eleventh exceptions are:

"Tenth. Because the jury, before they reached any conclusion or

made any award, decision or report, without the presence or any notice to the petitioners or their counsel, called in before them and conferred with Mr. Charles H. T. Collis, one of the board of city trusts, respondents, in reference to certain questions about which they desired information.

"Eleventh. Because the jury, after so conferring with Mr. Collis, declined to permit the petitioners or their counsel to give their views in reference to what they conferred with him, or be heard at all on such questions."

It is not necessary for us to decide whether we would receive the testimony of a road juror regarding matters which had taken place in a jury-room, as the circumstances to which exceptions are taken are sufficiently established by the affidavit of General Collis. Although it satisfies us that there was no intentional impropriety, either on the part of General Collis or the jury, we, nevertheless, feel great regret at the occurrence. The jury evidently did not reflect that, although General Collis was the solicitor of the city, he was also, as a member of the board of trusts, a party to this proceeding. And General Collis, although he appeared before the jury in answer to their summons, seems to have made no statement and given no opinion which would justify our setting aside this proceeding. It was the irregularity of his appearance at all with which fault can be found, and this, under the circumstances of the case, seems to have arisen from a misapprehension, which we think can, without injury to any one, be overlooked.

Not agreeing, therefore, with the petitioners in their view of the case, their exceptions are hereby dismissed, and the report of the jury confirmed.

E. Spencer Miller, Esq., for the petitioners.

Hon. F. Carroll Brewster, for college.

[Leg. Int., Vol. 32, p. 98.]

GRUBB vs. THE MANUFACTURING COMPANY.

Service on a director of a corporation under the act of March 17, 1856, is good, where none of its officers reside in the county, and part of the property of the corporation is in the county, and the articles of association designate the county as the place of its principal office.

Motion to set aside the service of the writ. Opinion delivered March 6, 1875, by

ALLISON, P. J.—The return of the sheriff is as follows:

Served the within writ by leaving a true and attested copy of the same at the dwelling of Frederick J. Kimball, a director of the said "The Lancaster Manufacturing Company," in Germantown, with an adult member of his family, the president, treasurer, secretary, and chief clerk of said company, not residing and not being found within my bailiwick, and a part of the property of said company, to wit, the books and furniture of its principal office, having, up to about the first day of November last, been situated in my said bailiwick, the articles of association of said company designating Philadelphia as the place of said principal office, having been recorded in said county, under the act of assembly in such case provided. This service is made under the first section of the act of March 17, 1856, Purdon, 287.

The service, it will be seen, is made upon a director of the Lancaster Manufacturing Company, at his dwelling-house, in Germantown, the officers of the corporation not residing in the city of Philadelphia.

It is made a ground of objection to this return, that as the defendant had not at any time real estate in Philadelphia, the service was not warranted by the act of assembly. The act speaks of property of the defendant, in whole or in part *situated* in the county, in which service is made; this, it is argued, relates to real property, the word "*situated*," in its strict legal signification, having reference to real estate, and not to personal property. Real estate has always a fixed situs or situation, which is not the case with personal property, but in ordinary acceptance, the word has a more general and extended meaning; it is to be seated; placed or standing with respect to any other object; being in any state or condition with regard to men or things. In the interpretation of statutes, words are to be taken in their usual or common meaning, rather than according to their strict technical understanding, unless a contrary intent is made to appear. If the construction for which the defendant contends is to prevail, it would require us to hold, that the act had no application to corporations who are not owners of real estate; there can be no good reason assigned in support of this interpretation, it being equally important to obtain service upon a director, so as to bring into court corporations defendant, whether they do or do not own real estate, when the officers of the company do not reside or cannot be found in the county.

A reasonable construction must, of course, be given to the act, so as to avoid the mischief that has been suggested, from bringing personal property into a county for sale, by sample, card or specimen; it must in one sense be permanently placed or fixed; as furniture is placed in a house or office, or a stock of goods stored or placed for barter or sale in some fixed place. This rule of right reason was applied by the Supreme Court, in *Purke vs. Insurance Company*, 8 Wright, 422, when they held, that the act of April 8, 1851, which allows corporations to be sued in every county where they had an agency or transacted any business, meant only such counties in which they had a branch office, or a permanent agency for the transaction of business.

This proceeding is commenced in the usual manner by summons; the language of the act is, it shall be lawful to serve the same on any manager or director in said county; this implies that the service shall be in the manner prescribed by law. It does not require that it shall be served personally, or by giving a copy to the director or manager; but any form of service which the law declares to be a sufficient service of a summons, answers the exigencies of the case. To leave a true and attested copy of the writ at the dwelling of the director, within the county, with an adult member of his family, is a compliance with the requirements of the law.

Nor do we think the objection to the service founded on the fact that the property of the corporation had been removed from the county, before the issuing or service of the writ, is well taken.

The Legislature has from time to time enacted laws, to enlarge the rights of suitors against corporations, so as to enable them to obtain service of process against them. This was found to be, in many in-

stances, a practical difficulty, which rendered service inconvenient, and often impossible, and grew out of the very nature of these intangible bodies, having the power to transact business in many places at the same time, and who could, at any moment, take wings, as it were, and fly away and leave their creditors helpless and without remedy. The service in this respect is a literal following of the act of assembly, and is as well within its reason and spirit.

The motion is refused.

Messrs. *Morgan* and *Penrose*, for motion.

E. Spencer Miller, Esq., contra.

[Leg. Int., Vol. 32, p. 98.]

FINCH & COMPANY vs. BULLOCK & COMPANY.

The court will, in their discretion, on the application of the garnishee in a foreign attachment, direct the plaintiff to issue a *scire facias* against the garnishee.

Rule to show cause why an order should not be made on plaintiffs, requiring them to issue *scire facias* to garnishees. Opinion delivered March 6, 1875, by

ALLISON, P. J.—The application for the order is made by the Philadelphia Warehouse Company, who appear upon the record as garnishees by virtue of an act of assembly, approved June 13, 1874, P. L. 285. The foreign attachment issued September 20, 1873, under which a quantity of iron was seized in the hands of E. J. Etting, a warehouseman, who was summoned as garnishee. Etting had given a warehouse receipt, upon which the Philadelphia Warehouse Company had advanced money, who thereby became the owner of said iron, to the extent provided for in the act of September 24, 1866, Purd. 114. It is to obtain a definite determination of their rights under the advances made upon said receipt, that this rule has been taken by the warehouse company.

The several acts of assembly relating to foreign attachment, seem to be wholly wanting, as to any provision which will enable a garnishee to bring the cause to trial. After judgment at the third term against the defendant the plaintiff may assess his damages, and have a writ of *scire facias* against the garnishee, but there is no corresponding right given to the garnishee, by any express stipulation, to bring the cause on to trial; the result of this is, that unless the court have power to require the plaintiff to speed the cause, and issue his *scire facias*, to which the garnishee may plead, he is without remedy. The embarrassments which arise under this law appeared in the case of *Cookson & Waddington vs. Turner*, 2 Binney, 453. The foreign attachment issued to March term, 1796; nothing was done for fourteen years after judgment had been entered against the defendant, when the defendant moved the court for a rule to show cause why the attachment should not be dissolved, on the ground of the great delay in executing a writ of inquiry. The court do not seem to doubt their power to grant the relief sought by the defendant, but refused to dissolve the attachment; the plaintiffs having satisfactorily accounted for their delay.

In *Weber vs. Carter*, 1 Philada. Rep., foot page 221, a similar motion

was made on the same ground—the laches of the plaintiff. The District Court seem to have had doubt as to their power to dissolve the attachment, remarking, as to the garnishee, the attachment is a defence to him against the defendant, and that defendant has a short mode of dissolving the attachment by giving security. This question, between the same parties, was again before the District Court, reported on page 273 of 1 Philada. Rep. It was disposed of, by granting a rule to show cause why the plaintiff should not proceed, or otherwise a *non pros.* be entered, and on the return of the rule, an order was made, that the plaintiff proceed, on or before a given day, and upon the expiration of the time named in the order, the plaintiff not having proceeded, a judgment of *non pros.* was entered. The conclusion seems to have been reached, that it was in the power of the court to grant relief, when the plaintiff in the attachment neglected to proceed, after tying up property in the garnishee's hands. The court was driven to this result, as it could not hold that the right to issue a writ of foreign attachment, carried with it a power to embarrass the party upon whom the attachment is laid as garnishee, for an indefinite period, and by refusing to proceed, present a settlement of all questions in dispute between the defendant and the garnishee, unless the defendant elected to dissolve the attachment, by entering security. In this case the warehouse company stand in the same relation to the cause as if the attachment had been laid upon the effects or property of the defendants in their hands, the act of 1874 puts them in the cause as garnishees, and the warehouse act of 1866, making them in a qualified sense owners of the property receipted for, they ought to be enabled to have the case put at issue and brought to trial. In attachment execution the writ goes out with a clause in the nature of a *scire facias* to the garnishee, to which he can plead, and so it ought to be in foreign attachment. The reason and spirit of the proceeding render it every way proper that this should be done; the parties are in court; their respective rights ought to be settled by a trial, and we therefore make the order, that the plaintiff issue his writ of *scire facias* against the Philadelphia Warehouse Company, returnable to the first Mouday in April, 1875.

George Junkin, Esq., for the rule.

Thomas J. Ashton, Esq., contra.

[Leg. Int., Vol. 32, p. 106.]

SELLERS *et al.* vs. THE PENNSYLVANIA RAILROAD COMPANY *et al.*

A special injunction to restrain the erection of a proposed abattoir and slaughtering-house, will not be granted where the affidavits do not establish the fact that they will be a nuisance.

Opinion delivered March 20, 1875, by

ALLISON, P. J.—The complainants charge that the Pennsylvania Railroad Company have agreed to lease to Joseph J. Martin and his associates, who are named in the bill, a tract of land of which the company are the owners, situate between the west side of the Schuylkill river and the east side of Thirty-fifth street, and between a line north of Market street, commencing on the north side of the pier north of the grain warehouse, and extending west to Thirty-fifth street, thence

horth to the northern boundary of the property of the company, defendant. This tract of land contains about twenty-three acres, and by the terms of the lease is to be used for a stock-yard, with the right on the part of Martin and others to erect upon the premises a building with the necessary fixtures and apparatus for killing and dressing cattle, sheep, and hogs.

The complainants state that they are the owners and occupiers of real estate in the immediate vicinity of said tract of land, and they aver, that the use to which it is to be applied will greatly depreciate the value of their property, destroy their comfort, endanger their health, and will be a public and common nuisance, from the stench arising from the bodies, alive and dead, of the cattle, sheep and hogs, which it is proposed to keep and to kill on the premises.

The plaintiffs further aver, that the drainage from this yard and slaughter-house will be carried into the river Schuylkill, which will convert the stream from Fairmount dam to Gray's ferry into a source of dangerous infection. That the putrescent animal matter carried into the stream will impregnate the mud-flats below the wharfing, which are bare at low tide, so as to become, when exposed to the sun during the summer months, injurious to the health of complainants, and to the inmates of the almshouse and university hospital, and other public institutions.

The statement is also made that the removal of the offal, blood and filth, from the premises, in boats and cars, will destroy the comfort and imperil the health of persons in the neighborhood through which they will pass. That the wharves and piles along the river, and the wooden structures upon the premises, will become saturated with offensive matter, and give off, when exposed to the sun, exhalations dangerous to health.

The complainants pray that the Pennsylvania Railroad Company may be enjoined from further proceeding to establish the said stock-yard and slaughter-house, or abattoir, as it is termed, and that Martin and his confederates shall also be restrained from using the premises mentioned as a stock-yard and place for slaughtering and dressing animals, and that all parties defendant be enjoined from executing the proposed lease.

The grounds upon which this application is resisted are set out in the affidavits of several of the defendants, and consist of a specific denial of all the statements set forth in the bill, which constitute the equity of the plaintiffs. Admitting that they do intend to found a stock-yard and abattoir on the premises in question, they deny that as they propose to set up and maintain the establishment, it will constitute a nuisance as to the individual complainants, or either of them, or to the public.

They aver that the offal, fat, or tallow, is to be removed from the premises to a point near to the mouth of the Schuylkill, several miles from the abattoir, where it will be rendered in sealed tanks, and that no part of the blood or offal will be allowed to go into the sewer or river; that the offal and fat will be conveyed away in boats and cars, put up in iron casks or barrels; that the blood will be collected in the same manner as that which is followed in the abattoir in Jersey City—received into vessels direct from the animal, placed at once in sealed

tanks, and in less than four hours thereafter, and before decomposition can set in, converted into an article of commerce. The process is by evaporation, and is claimed to be inoffensive and not injurious to health.

The stock-yard and abattoir are to be paved with Belgian pavement, and the abattoir or slaughter-house is, in addition, to have a covering of asphalt, which will render the premises impervious to water, and thus prevent the ground from being permeated with offensive matter, and free from all noxious exhalation.

This direct affirmation, and as direct a denial, and the accompanying affidavits, present squarely the question of nuisance, accompanied with injury and damage to the complainants, and of injury to the public, prejudicial to comfort or to health. No one at this day, as was remarked in the comparatively late case of *Rhodes vs. Dunbar*, 7 P. F. S. 275, will, for a moment, doubt that we are invested with ample power to prevent the erection of any structure intended for a purpose which will be a nuisance *per se*. This power has been styled a kingly prerogative, but it is a prerogative which few kings in our day possess, and which no one who does not possess it would dare to assume. It ought, in every case, to be exercised by those on whom the law imposes the duty, only when a case is made out beyond all reasonable question or doubt, and even then it is of grace and not of right. There must be most careful consideration, so as to rightly determine whether, upon the whole case as presented, one exercising equity jurisdiction ought to stretch forth the hand of repressive and preventive authority. Before he can, in justice to himself, as well as to the parties litigant, control and restrain the exercise of one of the clearest and most sacred rights of a citizen, the use of his own property, he must be satisfied that the welfare of the individual suitor, or that of the public, outweighs the disadvantages which will result from an injunction. The burden rests upon the plaintiff, and he must make the way clear and the path straight before he can properly ask the exercise of this high chancery power in his behalf; to doubt, is to refuse the application. In *Sparhawk vs. The Union Passenger Railway*, 4 P. F. Smith, 421, the court say, a plaintiff has no case if his equity is doubtful; a doubtful equity would be an anomaly.

In this case plaintiffs claim that they start with the *prima facies* in their favor; that defendants admit that they intend to found an institution which in law constitutes a nuisance *per se*, and that the burden of proof to the contrary is shifted upon the defendants, and that they must show beyond doubt, if they would avoid an injunction, that their proposed stock-yard and abattoir will be so conducted as not to be a nuisance. In support of this conclusion several authorities are cited. Judge Sergeant's charge to the jury in the case of *Commonwealth vs. Van Sickle*, 7 Penna. L. J. 82, in which he states the general principle that persons owning city lots—and he might have added owning property almost anywhere—are entitled by right to healthy air, and the use of public highways, unimpaired by any adjacent nuisance. The statement by Mr. Justice Read, at Nisi Prius, in *Rhodes vs. Dunbar*, 7 P. F. Smith, that a swine-yard, a pig-sty, or pig-boarded-house (Van Sickle's case), a slaughter-house, have all been declared nuisances. To the same point are *Catlin vs. Valentine*, 9 Paige, 575, decided by Chancellor Walworth; *Brady vs. Weeks*, 3 Barbour, S. C. R. 157;

Smith vs. Cummings, 2 Parsons, 92. To these may be added the many cases in which the same principles have been applied and enforced in the Common Pleas and Quarter Sessions of this county for the past twenty-five years and upwards. Conceding the correctness of the doctrine of which the plaintiffs claim the benefit, yet it cannot be denied, that each case, as it has arisen, has been, and all future cases must be, decided upon their several specialties. If you establish the fact of the existence of a pig sty, or slaughter-house, or bone-boiling establishment, the presumption that they are maintained as such places are known to exist follows, and the law says, judging by all past experience, every such place is *per se* a nuisance. But this does not conclude a defendant from showing that in his particular case he has departed from that which is customary, and keeps his pig-sty or slaughter-house in such a cleanly condition that it offends not against the comfort or health of any one. If this can be made to appear, no indictment can be supported, or injunction go out against him; not even though he set up his cause of complaint in the very heart of the city, and upon its best improved and most fashionable highway. This is not a question of mere good taste or consideration for preference of others, or of pecuniary advantage to the defendants. It is strictly a question for legal and equitable adjustment, and upon this basis alone we are to decide the case before us.

The question as it stands now, upon the war of affidavits, which has been so vigorously waged, has brought it to the practical issue, of nuisance or no nuisance—private as well as public. Plaintiffs allege that they will sustain a special grievance arising out of a common injury, which, in the depreciation of the value of their property, and injury to their comfort and health, will press more upon them than it will upon others, who will not be so immediately within the influence of it. The correctness of this principle cannot, we think, at this day, be successfully questioned in Pennsylvania; nor is it denied by the defendants, who say, that while a private citizen may, in this Commonwealth, sue or come into a court of equity to ask for an injunction against a nuisance, which causes him damage alone, or beyond the rest of the community, yet where he suffers in common with others, the attorney-general is the proper party to interfere. The defendants do, however, object to the joinder of plaintiffs, having distinct interests as owners of separate and distinct property; it is argued that the injury to each one being several and joint, they cannot join themselves together. This view seems to have been supported in the case of *Hudson vs. Muddison*, 12 Simons, 418; and in *Sparhawk vs. The Union Passenger Railway Company*, Judge Strong remarks, it may be there is a formal error in the joinder of parties having distinct interests; if there is, it is remediable by amendment. This reply is as appropriate in this case as it was in the one last cited; but numberless cases can be found, we doubt not, of which *Rhodes vs. Dunbar* is one, which have gone to final judgment, where parties, plaintiffs in the same suit, have stood in shoes each somewhat different from the other. The error at most is but formal and technical, and if the case on final hearing should be found to be with the complainants, the bill as to all of them could be dismissed, except as to one, and judgment given in his favor.

We do not propose to pause or turn the plaintiffs out of court at this stage of the cause on this ground, but to look rather to its merits, and upon these to rest our decision.

The allegations upon which plaintiffs found their case are supported by a most formidable array of authority. Much of it comes from those who are among the most eminent of our citizens, especially that which emanates from the medical profession, professors of medical colleges, surgeons and physicians of many of our charitable, curative, and surgical institutions. To this is to be added the statements and testimony of scientists and sanitarians, as well as that which is non-professional, from this city and from the cities of Chicago, Boston, and Providence. Great industry and skill have been displayed by those who have addressed themselves to the work of preventing that which they fear and believe will be a nuisance. If their fears are well founded, and can be shown to be almost or altogether certain to be realized, the way is clear and the path of duty plain; but it is not to mere fears and anticipation of coming evil to which courts must look, and by which they are to be guided, but to the facts which have been proved, and upon which their fears are grounded. In 3 Atkyns, 750, Lord Hardwicke refused to enjoin against the erection of a house to inoculate for the small-pox, and held that bills to restrain nuisances must extend only to such as are nuisances at law, and that the fears of mankind, though they be reasonable, will not create a nuisance.

Thompson, chief justice, recognized the authority of this case in *Rhodes vs. Dunbar*, and in support of this principle cited *Carpenter vs. Cummings*, 2 Philada. Rep. 74, in which the court denied an injunction against maintaining a steam boiler under the pavement of a public street. The complainants rested their case on the fear that the boiler might explode and destroy their property and lives.

Rhodes vs. Dunbar was finally decided by a majority of the court upon this ground, dissolving the special injunction which had been granted at Nisi Prius against the re-erection of a planing mill on Twenty-first street, near Chestnut, which had been destroyed by fire. But in *Wier's Appeal*, 24 P. F. Smith, 230, an injunction was granted by a majority of the judges against the erection of a powder-house near the property of complainants, to prevent irreparable damage. This decision is rested in part on legislation making the storage of gunpowder in certain localities unlawful, and on the character of the risk which results from the storage of gunpowder, nitro-glycerine, and other chemicals of a highly explosive nature, it being impossible to guard against the consequences, or set bounds to the injury to property and life which may result from an explosion. It is the exception which is recognized in *Rhodes vs. Dunbar*, and may be regarded as the exception which proves the rule.

But even more; the plaintiffs are required to show that they will sustain both injury and damage; the injury must be irreparable, and so great, or of such a nature, as to be incapable of compensation in damages: *Hilliard on Injunction*, 324; *Campbell vs. Scott*, 11 Simons, 39. It is, therefore, essential to ascertain just what is proved by the affidavits of the complainants. In a case of this character, plaintiffs cannot be required to do more than establish the correctness of inferences or opinions, based on that of which they have been informed, and believe,

or which the defendants confess they are about to do; but if any part of plaintiff's case has been shown to have no foundation in fact, or has been fully answered by the proofs against the motion for the injunction, then all such inferences and opinions must be set aside. We propose to try and ascertain how the question stands upon its several grounds of objection made by plaintiffs, tested by affidavits in the cause. We take up first the alleged pollution of the Schuylkill, and the consequences, which, it is asserted, must necessarily flow from it. Upon the sworn statements contained in the letter of Dr. J. H. Rauch, to John Sellers, Jr., of November 27, 1874, the greatest reliance is placed. Dr. Rauch is a gentleman of the highest attainments as a sanitarian, who has given to the subject of this proposed cattle-yard and abattoir very careful investigation. He says the most important objection, from a sanitary standpoint, will be the necessary drainage of refuse matter into the Schuylkill river. 15,000 pounds of organic decomposable material will daily enter into the river from this source. It is upon this and other sworn statements of Dr. Rauch, that much of the case of the plaintiffs depends. Quite a number of the affidavits in support of the motion express an opinion that the proposed abattoir will, from this cause, be a nuisance, upon the strength of what Dr. Rauch has said. Upon the special point of the pollution of the river from the drainage of 15,000 pounds of animal refuse into it per day, there is the most direct and specific contradiction by the defendants. John R. McPherson, one of the defendants, says, more live stock is slaughtered daily in the abattoir in Jersey City than is required for the entire daily consumption in Philadelphia, and I do not hesitate to say, that the blood from the animals so slaughtered, is so carefully collected that the entire daily loss by washing the floors and other causes will not amount to a barrel of forty gallons daily. The value of the blood is so fixed and determined, that we would, with as much propriety, throw away the meat as the blood. He further says, we propose to adopt the same system in the establishment on the Schuylkill as that now in operation at Jersey City. The affidavit of Dr. John J. Craven, of Jersey City, a physician and surgeon, as well as a practical chemist, treats in a very intelligent manner of the condition and mode of carrying on the abattoir at Harsimus Cove, and of the results which will follow from conducting the stock-yards and abattoir on the Schuylkill in the way in which the Harsimus Cove or Jersey City establishment is managed. Of the objection that a nuisance will arise from the drainage into the Schuylkill, he says there will be no drainage from the storage pens; the accumulation of deleterious matter in the storage of live stock is carefully guarded against, the floors are kept dry and clean, and free from absorbent matter. These statements of Dr. Craven are sustained by the affidavit of Joseph J. Martin. This covers the question of drainage into the Schuylkill of blood and offal, and also of objectionable matter from the stock-yards, and answers that which the plaintiffs and their witnesses have said upon this point of objection. These statements are based upon that which is sworn to be the result of the experiment at Harsimus Cove, and one such practical demonstration is of more value than all mere speculation. And when this is considered in connection with the proof of the amount of water which every day is added to the volume

of water between South street and Callowhill street bridge, by the rise of the tide, it will be seen how groundless are all fears of infection of the river. Mr. Shedaker, one of the surveyors and regulators of the city, testifies that it amounts at each tide to 129,000,000 gallons, or 258,000,000 in each twenty-four hours. To this is to be added the fact, which appears by the affidavit of Dr. Charles M. Cresson, of this city, that there is an average daily flow from the pool of the dam of 500,000,000 gallons, and in very dry weather of 300,000,000. From all this, it is easy to comprehend not only how infinitesimal must be the injury to the stream, but how effectual, as Dr. Cresson remarks, must be the expulsion of sewerage below the dam; an average of three times as much water as is necessary to raise that portion of the river between South and Vine streets, from low to high tide, flowing into it from above, thereby causing a uniform downward ground current, and thus preventing any deposit of solid sewerage up stream. One of the great advantages which is claimed will result from the establishment of the abattoir, will be the improvement in the purity of the water of the Schuylkill; the slaughter-houses in which almost all of the meat of animals consumed in Philadelphia are killed and dressed for market, are scattered through the various districts, which are embraced within the corporate limits of the city; many of these slaughter-houses drain into the Schuylkill, and are a source of great impurity to the water. The effect which will be produced by the establishment proposed by the defendants, it is contended, will be to absorb the general business of slaughtering animals in Philadelphia; the cattle will be conveniently concentrated, and the slaughtering will be done at a saving of money to the trade. The affidavits furnished by the defendants state that such will be the result, and the allegation upon this point of gain in the purity of the water supply, shown by Dr. Cresson, will serve to illustrate this assertion. He states that which is well known to every one, that under the present system of private slaughtering, no care is taken to convert offal into profitable commodity, or to free slaughter-houses from decaying and offensive material. In the spring of 1872 he made an examination of two small creeks emptying into the pool of Fairmount dam, one upon the eastern and one on the western shore. The result was a discovery of sixteen slaughter-houses, besides other nuisances, located on these streams; from nine of these slaughter-houses were reported the killing of 598 animals each week. Referring to the statement of Dr. Rauch, that there would be an influx of 15,000 pounds of sewerage of animal matter daily into the river from the proposed abattoir, he adds, we shall even at such a cost benefit ourselves greatly, because we are now daily receiving from slaughter-houses above the dam at least an equal, and occasionally two-fold that amount—30,000 pounds. The removal of these slaughter-houses from this location will improve the supply of drinking water by diminishing the amount of sewerage. With regard to the anticipated drainage of deleterious substances into the river from the stock-yard and abattoir, there is a paragraph in the affidavit of Dr. Craven, which, of itself, may be regarded as an answer to all that has been said by Dr. Rauch, in his affidavit on behalf of the plaintiffs, upon this point. He says, with regard to drainage generally from slaughter-houses, there is no reason why it should be permitted to taint

the water of any stream into which it flows, as it can be cared for by a simple and often used device, of a receiving and settling basin, with a filter outflow, from which the water would pass so pure that it could be used for drinking purposes, and in which there could not be detected any deleterious or noxious element. If these statements are true, what becomes of the important objection made by Dr. Rauch, and so generally relied on by plaintiffs, that from a sanitary standpoint the projected stock-yard and abattoir are most to be condemned because of the necessary drainage of refuse matter into the Schuylkill river? It must not be overlooked that these statements are not contradicted by anything in the cause. Nor ought it to be forgotten that by the case which the defendants have made, they are to be judged, not only now, but hereafter; that which they have affirmed to be fact, is that to which they are to be required strictly to conform. To depart from the case as they have presented it, is to expose them to the risk of that which they are now trying to avoid.

It has, we think, been clearly established that there is not only no perceptible injury to the water at the Jersey City abattoir, but that it has not in any degree been rendered impure. The specimens of piling taken from points, both in and out of the current of the tideway, fail to exhibit the least indication of being impregnated with noxious substances, and the vegetable and animal life which grew upon and adhered to them, seems to be inconsistent with the presence of offensive or poisonous matter. In addition to the mollusc in the shape of barnacles, the testimony is, that there was also found colonies of microscopic beings, the conditions of whose existence depend upon the purity of the saline or brackish waters. With regard to the vegetable deposits, the same remark is said to apply; and after investigation, nothing was discovered to forbid the growth and accumulation of the delicate alga found on the specimens produced. There are advantages claimed for the waters and for the situation of Harsimus Cove which are denied to the Schuylkill; the tide rushing in from the sea, only twenty miles distant, gives a fair current to wash away all impurities; while the drainage falls into a vast body of salt water of considerable depth and more than a mile in width. To this is to be added the southerly winds which prevail in warm weather, which come from the sea, purifying and invigorating, and charged with ozone, in place of being relaxing and debilitating, as with us. All this is doubtless true, but what bearing has it upon the question, if the cause of the infection does not exist, if the impure animal matter is not allowed to flow into the river or accumulate upon the premises? There are two other grounds of complaint upon which the bill is sought to be supported, and these may be considered together, the offensive and unhealthy smells from the cattle, alive and dead, which will be stored and killed on the premises, and the removal of the offal in boats and cars. But as to the first cause of offence, it is apparent that the witnesses speak of a condition of things which they suppose must necessarily exist where animals are kept and slaughtered in large numbers. The slaughter-house, as it has existed from the foundation of the city, with all its offensive surroundings, is evidently the standard which many of these witnesses have set up, and by which they have been guided in forming an opinion of the condition of things as they believe

they will exist in the abattoir on the Schuylkill, if it is allowed to be established. A large number speak of the disagreeable odors and stench which, in Chicago, Boston, and other places, result from the condition of cattle-yards and the slaughtering of animals, and the rendering of fat and tallow, in these locations. But the conclusions reached by all of these persons are clearly erroneous when applied to the case which we have in hand. The positive and sworn statements of the defendants are, that none of the causes of offence will be allowed to exist in the abattoir of Philadelphia, which, it is apparent, create the evils under different circumstances and in other places.

The consequences which fall upon the people of Chicago, because of the character of the establishments which are so offensively maintained in that city, are not with reason to be anticipated in Philadelphia; the cattle-yards are established upon the low, spongy, and in wet weather in part overflowed prairie, upon which Chicago was founded, and out of which portions of the city, more than once, have been bodily raised.

The cattle yards are paved with plank, which is worse than if they were allowed to remain uncovered; all the fluid matter must sink below the covering, where it can never have the healing benefit of sun and air, and must become, in all the spring, summer, and fall months, a source of offensive and poisonous effluvium. The drainage of these yards as well as that from the slaughter-houses, in which more cattle are killed than in those of any other city in this country, and perhaps in the world, runs to a great extent into the Chicago river. This, with the almost entire want of current, rendered it the nuisance into which it grew.

But more than all these, is the offence which results from the utilization of the offal, and the rendering of the fat and tallow upon the premises. These substances, when they accumulate in large quantities, must, in the summer months, of necessity, become, to some degree, decomposed, and in the process of conversion into marketable commodities, give off the most offensive odors, carried by the winds into the homes of the citizens, destroying comfort, and imperilling health and life. At Jersey City this is never allowed to accumulate; as soon as it is taken from the animal, while perfectly fresh, the process of conversion into profitable commodities begins.

The plan proposed for the yard and abattoir here is free from every one of these objectionable features. The covering of the ground with granite blocks will effectually prevent the absorption of anything offensive. The protection of the stream from the flow into it of any appreciable amount of blood or other deleterious matter, the transfer from the premises of the offal and tallow, and the prompt conversion and utilization of it, at a point far removed, show how unsafe it would be to be guided by an example like Chicago.

The Brighton abattoir, near Boston, falls very much below Chicago in the extent of the nuisance which some of the witnesses think that it is. At Brighton the fat and offal is rendered and utilized on the premises. This, more than all other causes, becomes, under ordinary management, an offence to a neighborhood in which it is carried on. We do not think that it is necessary to go into an examination of defendant's proofs touching the effect upon the comfort and health of the people residing in the vicinity of the stock-yard and abattoir of New Orleans, the testimony not clearly pointing out the exact situation of the premises

or the character of the neighborhood in which they are located. The same general conclusion may be reached in relation to the condition of the stock-yards of Pittsburgh, Harrisburg, and of this city, with the qualifications that, as to the first and last named, those who speak of their inoffensive character are, to a considerable extent, residents of the neighborhood; but they fall short of furnishing a proper standard by which to estimate correctly the necessary results of the establishment proposed for Philadelphia, there being no abattoir connected with either of them.

In point of location, climate, and atmospheric influence, the advantages are all in some degree with Harsimus. This conceded, does it follow that of necessity the defendants cannot carry on the business of slaughtering animals at the site selected by them on the Schuylkill, without creating a nuisance? Dr. Rauch thinks so, and a number of the affiants seem, with more or less certainty of conviction, to agree with him. Yet these conclusions are cautiously expressed, and are based mainly on the case as Dr. Rauch infers it must exist. Upon his most weighty ground of objection, the pollution of the river, we think it has been made to appear, if that to which the defendants have testified is true, that he is mistaken; and the basis of his conclusions having been swept away, this difficulty must be considered as no longer in the cause, upon this hearing for a special injunction. So also falls out of the case all the concurrent opinions resting upon the same foundation. And judged by the testimony before us the abattoir and stock-yards at Harsimus, to which defendants propose to conform, both in construction and management, are neither an offence to the sense of smell, nor prejudicial to health, and this is substantially conceded by the committee appointed by the complainants to make a preliminary examination of the establishment. Of the hog abattoir at Hackensack, the language employed is somewhat emphatic, but the strongest expression used in relation to Hackensack, where all the offal of Harsimus, as well as all the animals which die during transportation, are converted into fertilizing material, is, that the hogs smell badly. A remark, equally strong, might with truth be made, of many of our most important manufacturing establishments, but which would fall very far short of proving that they were nuisances. This report of the committee, sworn to by one of the complainants in the cause, does not aver that, outside of the building at Hackensack, more than slightly offensive odor was discovered, or that they detected in the air that which could properly be regarded as injurious to the comfort or health of any one.

It is an important fact bearing upon the question of location, that by permission of the board of health of New York, the cattle yards of the New York Central Railroad have been removed from One Hundredth street to a point nearly two miles nearer to the heart of the city, on the Hudson river, at the foot of Sixtieth street. The said board have also given their assent to the erection of a large abattoir at the foot of Fifty-ninth street, within about six hundred feet of Roosevelt hospital, the largest and most important institution of the kind in the city.

By permission of the same authority, a portion of the market-house at the foot of Fortieth street, which is 950 feet in length, is at this time being converted into an abattoir and rendering establishment.

Nearly every opinion expressed by the witnesses for the complainants is hypothetical or supposititious: assumed, but not proved; that of which

they complain is a mere anticipation of danger, not a certainty that it will occur, and is met by a flat denial that the causes of injury will be allowed here to exist, and a further denial, that from the standpoint of the complainants, or from any other condition of things, will the stock-yard or the slaughter of animals be a nuisance. It has been remarked, the anticipation of danger may be felt as well when it is infinitely remote as when it is near—as well when it may never occur as when it may. And thus the case of the plaintiffs seems to stand before us now, and is to be regarded as only “speculative, eventual, and contingent,” and this is seldom a ground for interference by injunction: *Earl of Ripon vs. Hobart*, 3 Mylne & Keene, 169.

The remaining objection relates to the removal of offal in boats and cars, but we see no reason to fear that any serious difficulty can arise from this cause—none certainly that cannot promptly be remedied if occasion should require.

We have given to this case the most full and anxious consideration, because of the consequences which might result from a mistake in the conclusion which we should reach; consequences which, if the complainants' apprehensions are well founded, are far beyond all pecuniary interests which could be involved, because they relate to the comfort and health and life of the citizen. The investigation of the testimony, after careful reflection, has failed to satisfy us that the complainants have made out a case so free from question or doubt as to justify us in arresting the further progress of the work. On the contrary, we do not believe that as the business is to be conducted it will be an injury to the comfort or health of any citizen; that outside of the premises there will be any odors that will give offence. If in this we should be mistaken, the power is in our own hands. If the establishment as a whole, or in any part of it, should offend against the law, it can be promptly suppressed; and we propose to keep control of this case until the experiment has been fully tried, and also to impose terms regulating the construction of the cattle-yard and abattoir, requiring that every safeguard which has been or can be properly suggested shall be applied.

Before making any order upon the present motion we will require the defendants to file in the cause a plan of the proposed construction, the *ad interim* injunction to stand until the plan has been examined and approved by the court.

If the defendants choose to go on and erect their buildings and construct their cattle-yards, when the order refusing the special injunction shall have been made, they will go on at their own risk. Nothing can be decided now but the question of the special injunction; if, upon final hearing, on bill, answer and proofs, a case should be made out against them, any order that shall now be made will in no degree embarrass the court in entering such a judgment as the proof may require; and even if a final injunction should be refused, it leaves the defendants liable to prosecution, or to be restrained at any time thereafter, if their business should be so conducted as to be a nuisance, either to individuals or to the public generally.

Chas. B. McMichael, E. Spencer Miller, and William H. Rawle, Esqs., for complainants.

Theodore Cuyler, George W. and Chapman Biddle, Esqs., for defendants.

[Leg. Int., Vol. 32, p. 116.]

ELTON vs. GEISSERT et al.

The 27th section of Article III. of the new Constitution is obscurely worded, but its manifest purpose was to get rid of the State officers of inspection.

When the Constitution says, no office for inspection or measuring shall be continued, and an intent to the contrary does not appear, we are to suppose the convention intended to mean that they should not be continued after the adoption of the Constitution.

What is said upon the floor of the convention is a proper aid in an investigation of this character.

The general sections 26 and 29 of the schedule do not control or modify the 27th section of Article III., as it is "otherwise provided in the Constitution."

The schedule was added to prevent inconveniences from changes in the Constitution; this, in its effect on persons in office, was intended to prevent inconvenience to those who filled offices, in harmony with the instrument, not to those who were to be deprived of office by its adoption. A general provision in statutes does not overrule a special provision, when both can be so construed as to stand.

The motion was for a special injunction to restrain Geissert from inspecting leather, and Massey & Janney from selling leather inspected by him, and not by Elton, the commissioned inspector.

Hon. *William B. Mann*, for petitioner, contended:

That the office of leather inspector was not abolished under the new Constitution, because it is not done expressly, and that whenever the convention designed to abolish an office they did so in express words: *Bright vs. Oakdale*, Leg. Int. 1874, p. 141; *Clearfield's Case*, Id. p. 118; *O'Mara vs. Commonwealth*, Id. p. 332; *Cooley*, p. 57. That the section is in the article on legislation, and relates to future legislation: it is not to act on existing offices or vested rights: *Commonwealth vs. Hartranft*, Legal Int. 1874, p. 404; *Holt vs. Deshler*, 2 Smith, 301; section 26 of the schedule protects all persons in office. Section 29 protects their compensation. The Constitution is made to protect, not to destroy.

W. H. Drayton, Esq., contra, said:

When the words used convey a clear and positive meaning, the court may not add to or take away from it: *Cooley on Const.*, p. 57.

Should the words used not seem clear by the court, they should search the debates in the convention, and the construction of the executive department, and all sources from which the intent may be ascertained, and from these, if possible, ascertain the mischief and the proposed remedy: *Jones vs. Harrison*, 6 Excheq. 328; *Sedg. on Statutes*, p. 229; *People vs. Potter*, 47 N. Y. 378; *Clark vs. The People*, 26 Wend. 599; *Gardner vs. The Collector*, 6 Wallace, S. C. R. 499.

There is nothing to warrant an inference that the 26th and 29th sections of schedule were intended to affect the plain meaning of the 27th section of Article III.

A particular intent is not to be revoked or altered by a general intent, unless it is clearly referred to and embraced in it; *Bounty Accounts*, 20 P. F. S. 92; *Pretty vs. Solly*, 26 Beavan, 610; *State vs. Goetze*, 22 Wiscon. 363; *Potter's Dwaris*, 110, 131, 273.

Opinion delivered *March 27, 1875*, by

ALLISON, P. J.—The plaintiff, who was commissioned by the governor, seeks to restrain by injunction the defendants, Geissert, Lehr and Bunting, from acting as inspectors of leather, and the firm of Massey & Janney from dealing in leather inspected and marked by them.

The decision of this question involves a construction of section 27, Article III., of the new Constitution, and of sections 26 and 29 of the schedule. These sections are as follows :

No State office shall be continued or created for the inspection or measuring of any merchandise, manufacture or commodity, but any county or municipality may appoint such officers when authorized by law : section 27, Article III.

All persons in office in this Commonwealth at the time of the adoption of this Constitution, and at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in this Constitution : schedule, section 26.

All State, county, city, ward, borough, and township officers in office at the time of the adoption of this Constitution, whose compensation is not provided for by salaries alone, shall continue to receive the compensation allowed them by law, until the expiration of their respective terms of office ; schedule, section 29.

The chief difficulty arises from the obscure wording of the section of Article III., above quoted. The article treats generally of legislation, and the cognate subject of bribery by and of a member of the Legislature, punishment of the offence, and obligation to testify in such case.

The plaintiff contends that this classification argues an intention on the part of the framers of the Constitution to control future legislation upon the subject, but not immediately to abolish the office of inspectors of merchandise, manufacture or commodity. The tense is future. No State office "shall be continued or created ;" this necessarily relates to future legislation in so far as it forbids the *creation* of State offices of inspection. There is no other way in which such offices can be created. Those which had been established, and to which the article was intended to apply, had been called into existence by legislative authority ; they could exist by virtue of no other power in the Commonwealth. This portion of the section is therefore to be read as if the words "by the Legislature" had been inserted after the word created. It would then read : No State office shall be continued or created by the Legislature. The intention is clear to make it impossible to establish in the future any such office by legislation. But what of the preceding phrase "shall be continued ?" Is it also to be read as if the interpolated words—by the Legislature—followed it immediately in the section in the order in which it is there placed ? It would then read, "No State office shall be continued by the Legislature for the inspection," etc. That this cannot be the true reading of this portion of the section is apparent from the fact that by no preceding statement had the continuation of these offices been referred to. If it had been provided that as they then existed, they should cease, either immediately or at some designated time in the future, a provision that would prevent their being thereafter revived or continued by the Legislature would be easily understood. But as the Constitution contained nothing of the kind, it did not require that a restriction should be placed on legislation, which would prevent these offices being continued. The laws under which they had been created remaining in full force, the offices would survive, to be filled by the appointment of the governor. There is, therefore, no other way by which

effect can be given to the whole of the clause of the section, except to interpret it as if it had read: No State office shall be continued after the adoption of the Constitution, or created by the Legislature for inspection.

It would have been much more satisfactory, and freed from all difficulty, if the section had been thus framed, or if in direct terms it had been made to read: "The State offices of inspection of merchandise, manufacture or commodity, are hereby abolished." The argument is not without force that, in all other instances, when there was an intention to abolish an office or a court, this intention is clearly expressed, as will appear by the 5th section of Article V., relating to associate judges not learned in the law, in counties forming separate districts.

Art. V., section 12, reads: "In Philadelphia the office of alderman is abolished."

Art. V., section 21: "The Court of Nisi Prius is hereby abolished." Equally clear is section 22 of Article V., and sections 7, 11, and 12 of the schedule.

But this argument is not of itself absolutely conclusive against the view contended for by the defendants. There are more ways than one in which to express a purpose, which was in the mind of the convention, and if we can ascertain what that purpose was, at any time, when an attempt was made to set it out in the instrument, whether it is clearly or obscurely expressed, and the language in which it is clothed will justify an interpretation consistent with such a purpose, we are to give effect to it, that it may become operative, if not according to the letter, yet so that it shall be in agreement with the spirit of the section of which it is a portion, or of which it may constitute the whole. The intention is always to prevail over the letter, if it can be ascertained; we are to look to that which is sought to be accomplished, rather than to the manner of stating the purpose, which was in the mind of the framers of the instrument. The inquiry is therefore a most important one—what was the purpose which the convention sought to accomplish, or the mischief for which they desired to provide a remedy? Without doubt it was to get rid of the State offices of inspection, and when they said no State office for inspection or measuring shall be continued, and an intent to the contrary does not appear, we are to suppose that they intended to mean that they should not be continued thereafter, that is, after the adoption of the Constitution, that the mischief should be at once remedied. To reject this conclusion would be to hold that the offices would indefinitely continue, the laws of their creation not having been abrogated, and would render the clause that they were not to be continued, insensible and unmeaning, as they would continue by virtue, not of future, but of past legislation. The debates of the convention, vol. 7, page 414, etc., show what was in the mind of the convention when this section was adopted, and that this is a proper aid in an investigation of this character is laid down in *Potter's Dwarrior on Statutes*, page 128–133. This is looking at the actual condition of things when the Constitution was framed and adopted: *Clark vs. The People*, 26 Wend. 599, etc.; *Gardner vs. The Collector*, 6 Wallace, S. C. R. 499; *Cowtant vs. The People*, 11 Wend. 571. If we thus reach an explanation of what might otherwise be regarded as obscure and hard to be understood, what

is our duty but to give such a construction to the section as will suppress the evil and advance the remedy, and to add, as has been said, force and life to the case, according to the intent of the makers of the Constitution, *pro bono publico*.

But it is contended as against this view that the sections of the schedule 26 and 29 control and modify the 27th section of Article III. The purpose of these two sections of the schedule is to save to all persons, for the full term, the enjoyment of any office to which they had been appointed or elected, as well as the compensation in fees which had been allowed to them by law, with the very important qualification, "unless otherwise provided in this Constitution." This, it has been argued, is to be rendered, unless such *persons* have been otherwise provided for in the Constitution, both as to office and compensation. This was done for the judges of the Court of Common Pleas and District Court of this city and of the county of Allegheny, and for the surveyor-general of the State. The 26th section does not say, however, that all persons in office at the adoption of the Constitution shall remain therein, and receive the fees provided by law, but it does say, that this shall be the working of the Constitution, unless it is otherwise provided. Now, if we are correct in holding that inspections under laws then existing were to cease according to the true intent of section 27 of Article III., upon the adoption of the Constitution, then it does provide otherwise; it provides in effect that the laws which authorized the appointment of this class of officers should be practically abrogated, and they thus fell with all other laws covered by the 2d section of the schedule, which continued in force only such as were not inconsistent with the Constitution. We cannot read this last clause of section 26 of the schedule as the plaintiff reads it, as continuing in office until the end of their term all persons for whom some other provision had not been made in the Constitution, and thus to provide for them; but as continuing all such offices as were not inconsistent with the Constitution, and for which it had not provided otherwise. If, as we think, the intention was to declare that they should not continue after the adoption of the Constitution, then it did provide otherwise than that they should continue to the end of the term.

The schedule was added to the body of the instrument, that no inconvenience should arise from the change in the Constitution, but this, in its effect upon persons in office, was intended to prevent inconvenience to those who filled offices that were in harmony with the instrument, and not to such as had been deprived of their office by its adoption.

The general provision for persons in office, contained in the 26th and 29th sections, are not to be allowed to override the special and particular operation of Article III., section 27; both may stand in the instrument without conflict. This being the case, the latter does not take away or alter that which precedes it; *Dwarris*, 110, 273; *Churchill vs. Crease*, 5 Bingham, 180; 20th Wisconsin, 363; 26 Beavan, 610; 20 P. F. S. 92.

The injunction is refused.

William B. Mann, Esq., for plaintiff.

William Heyward Drayton, Esq., for defendant.

[Leg. Int., Vol. 32, p. 116.]

LEWIS vs. THE PHILADELPHIA AXLE WORKS.

A mortgage given by a corporation on its leasehold interest, machinery and fixtures, and no objections made against its validity by the company, cannot be defeated by an assignee in bankruptcy of the company on his affidavit that it was given without due authority.

Rule for judgment for want of a sufficient affidavit of defence.
Opinion delivered *March 27, 1875*, by

ALLISON, P. J.—This suit is an action of *scire facias* on a mortgage, of a lease, machinery and fixtures, executed by the defendant, August 28, 1874, to the plaintiff, for \$21,500. The corporate seal is affixed to the mortgage, attested by the secretary, and by him proved under oath, to be the seal of the corporation, and that it was attached in due execution of the instrument, which was signed, sealed and delivered, as and for the act and deed of the company defendant. The affidavit of defence is made by the assignee in bankruptcy of the Philadelphia Axle Company, and avers, that on the 18th day of December, 1874, the defendants were adjudged bankrupts, that no authority was given by the stockholders, or by the directors to the officers, to execute and deliver the said mortgage, and that at the date of the execution of it, the defendants were insolvent, that it was given to defeat the operation of the bankrupt law, and to give a preference to the plaintiff over the other creditors of the corporation.

The right to execute a mortgage of lease, machinery and fixtures, is denied.

The act of April 27, 1855, Purdon, 486, gives express authority, for a lessee for a term of years, of a colliery, land, manufactory or other premises, to mortgage his lease, with fixtures and machinery, with the same effect as in the case of a mortgage of a freehold title.

So also the act of January 11, 1867, enables manufacturing companies to borrow moneys, and secure the payment by mortgage of their *property*. In *Roberts' Appeal*, 10 P. F. S. 400, it is decided, that this act does not authorize a mortgage of chattels. The difficulty which presented itself to the mind of the court, was the proper construction of the word *property*, whether the act intended to embrace a mortgage of chattels, in using the term *property*, or only such property as had been usually mortgaged before the passage of the act. The attention of the court does not seem to have been called to the act of 1855, which clearly authorizes the mortgage of fixtures and machinery along with the lease, most of these when detached are chattels, and are within the express terms of the act. We do not think that the mortgaging of the lease, fixtures and machinery, was illegal, or beyond the power of the corporation. To hold that it was, would be to render null and void the act of 1855. But can the affiant raise the question of a want of authority to make the mortgage or to affix the corporate seal to it?

Gordon vs. Preston, 1 Watts, 387, decides, that a mortgage by a corporation, irregularly executed, would be voidable by the corporation, but if not objected to by them, they will be deemed to have acquiesced in, and ratified the proceeding, and that a judgment creditor cannot take advantage of the irregularity, so as to defeat the mortgage. Ratification is equivalent to a precedent authority, and in the case be-

fore us, as in *Gordon vs. Preston*, there has been more than time enough to enable the corporation to disavow the unauthorized execution of this mortgage, if it had been disposed to do so; there had been no disaffirmance of the act of the officer of the corporation, affixing the corporate seal to the mortgage, during all the time which elapsed between its execution in August, and the decree of bankruptcy in December following. The remedy in this case should be sought in the courts of the United States, if the assignee has any such right as he sets out in his affidavit of defence. The bankrupt act gives sixty days within which to avoid a mortgage or other security given to a creditor in view of insolvency.

The defendants' authorities cited upon the argument, are not, we think, applicable to the question before us, which is that of a presumed ratification of a mortgage; which, according to the affidavit of defence, was not executed with the knowledge or consent of the stockholders or directors.

These authorities go mainly to the question of the power of an agent to bind the corporation for which he acts, but do not cover the question of actual or presumed ratification of an act, originally done without authority, or in excess of the power conferred by the corporation. Alike inapplicable are the cases which go to the want of authority of a manufacturing company, to execute a mortgage of their leasehold estate, machinery and fixtures. The right in this case is, we think, clear.

Rule absolute.

R. C. McMurtrie and J. W. Paul, Esqs., for the rule.

H. M. Dechert, Esq., contra.

[*Leg. Int.*, Vol. 32, p. 116.]

LYNCH vs. KERNS.

Judgment cannot be taken for want of a sufficient affidavit of defence where the plaintiff was dead at the time of the issuing of the writ and the writ was not amended till after judgment day.

Rule for judgment for want of sufficient affidavit of defence. Opinion delivered *March 27, 1875*, by

ALLISON, P. J.—This suit was brought in the name of a plaintiff, who was dead when the writ issued, which was subsequently, but after judgment day, amended, by bringing in the legal representatives of the dead plaintiff, and making them parties to the record.

On the return day of the writ there was no legal plaintiff in court, nor was there such plaintiff competent to file a copy of the instrument of writing, upon which suit was brought, within two weeks after the return day of the original process. The affidavit of defence law is a just and necessary one, and its influence on the administration of justice has been most salutary; but it is a departure from the course of the common law, as a mode of obtaining judgment. Whoever would avail himself of its benefits, must follow the requirements of the act and bring himself fully within its provisions. This principle was recognized in *Thomas vs. Shoemaker*, 6 W. & S. 179, in which judgment had been entered in a suit brought on a promissory note, one day too soon; the last day of grace had not fully ended, and although the point was not made in the affidavit of defence, which went to the merits

alone, the Supreme Court held, that the judgment had been erroneously entered. The court say, had this objection been brought to the notice of the court below, it is not likely that they would have rendered a judgment for the plaintiff, or have held that defendant was bound to have filed an affidavit of defence. It would be preposterous to require a defendant to file an affidavit of defence, when it appeared that plaintiff had no cause of action against the defendant, at the time of commencing his suit.

An equally clear reason against judgment exists in this case; when suit was brought we had no legal plaintiff in court, and no one who could perform, within the prescribed time, that which is imposed on a plaintiff as a condition precedent to his right to take judgment for want of an affidavit of defence.

Rule discharged.

H. Hazlehurst, Esq., for rule.

Lucas Hirst, Esq., contra.

[Leg. Int., Vol. 32, p. 126.]

RHINE vs. THE DANVILLE, HAZLETON & WILKESBARRE RAILROAD COMPANY.

A garnishee in an attachment execution is not bound to answer irrelevant interrogatories.

Rule on garnishee to make full answers to the interrogatories. Opinion delivered April 3, 1874, by

BIDDLE, J.—The question as to what limit is to be set by the court, to the interrogatories to be propounded to a garnishee in an attachment execution, is one of some practical importance. A garnishee is to a certain extent a mere stakeholder, and the problem is to obtain from him answers which will give the true state of his relations to the defendant, without permitting such a scrutiny into his affairs as would be both onerous and unjust. The tendency of modern decisions is clearly to the effect that a simple denial of indebtedness is not sufficient. The garnishee must go further than that, but how much further is the question.

We find no rule laid down by authority, on this point, probably because no rule can be applied, which would be susceptible of adaptation to all cases. Every case, we think, will have to be decided therefore upon its merits, subject, of course, to certain general rules. At the foundation of these is good faith, on the part of the plaintiff as well as of the garnishee. The plaintiff will be assisted by the court to obtain fuller answers only when they think it is to obtain more precise information concerning "the estate and effects of the defendant in the possession or charge of the garnishee, or debts due from the garnishee to him," and not for some ulterior purpose.

In *Corbyn vs. Bollman*, 4 W. & S. 342, the interrogatory was propounded to a justice of the peace, who was the garnishee, as to "how many judgments are entered on your docket in favor of the defendant, and when were they entered, and how much in each of said judgments? State them specifically. State also the names of the defendants in said judgments." He refused to answer, and judgment was given against him in the court below. The Supreme Court, however, reversed it, on the ground that the interrogatory was "entirely irrelevant, and not such as he was bound to answer."

Good faith on the part of the garnishee is equally essential, the answers, if evasive, meagre, or inappropriate, would of course be considered unsatisfactory by the court.

The same sort of discretion has to be exercised by the court in judging of the sufficiency of the answers as in judging of the sufficiency of affidavits of defence. The necessity of a supplemental answer in the one case or a supplemental affidavit in the other, would depend on the circumstances of the case.

In the present case the plaintiff is a judgment creditor of the Danville, Hazleton & Wilkesbarre Railroad Company, which is leased by the Pennsylvania Railroad Company. That company is consequently made the garnishee in the present case, and is subjected to forty-two interrogatories. The object of the plaintiff apparently is, not so much to show that there is any indebtedness recognized as existing between his debtor and the garnishee, as to enable him to decide, whether if the lessees of this road had administered its affairs in a more economical manner, there would not have been. The following interrogatories show this to be the case: "No. 19. How much stationery was used per month? its kind, price and quality. No. 20. State accurately the quantity of wood consumed monthly, the names of the engineers using the same, and the price paid for the same monthly. No. 24. How many kegs of spikes were used per month, and what was the price per keg? No. 25. How many gallons of oil were consumed each month respectively? What was the quality of the oil so used and the price of the same? If of different qualities, state them and their respective prices."

As in the case of the justice of the peace above quoted, the interrogatories are not as to money in the hands of the garnishee or debts due by him to defendant, but are intended to elicit from the garnishee facts from which it might be inferred that he ought to have such money in his hands.

If a lessee of a railroad can be subjected to this species of supervision, not alone by his lessor but by every creditor of his lessor, it would certainly be a most intolerable burden. This, too, on a mere suspicion of indebtedness, of which there is not a particle of evidence, but on the contrary, the positive affidavit of the garnishee that there is none.

We would say, with Chief Justice Gibson, in *Hess vs. Shorb*, 7 Barr, page 232, "the exhibition of interrogatories in attachment is in the nature of a bill of discovery, and if the garnishee confess nothing the parties are where they started. All that can be said in such a case is, that the interrogatories have failed to produce the effects expected from them. But that does not preclude the plaintiff from going before a jury to make out his case aliunde."

The garnishee here, like any other defendant, is subject to the same call for books and papers, and under recent legislation can be compelled to testify. There would appear, therefore, no reason why this particular process should be stretched to its utmost limits, because a creditor should choose to assume that a citizen or a corporation, if all their affairs were scrupulously examined, might prove to be indebted to some one to whom he had lent money.

Rule discharged.

George Junkin, Esq., for plaintiff.

Chapman Biddle, Esq., contra.

[Leg. Int., Vol. 32, p. 134.]

SANGER et al. vs. THE CITY OF PHILADELPHIA et al.

Where the city has directed that a stream partly natural and partly artificial should be culverted, defendant, who was the contractor to fill up and grade a street, will be restrained from filling up the stream before the culvert has been erected.

Sur application to dissolve injunction. Opinion delivered April 10, 1875, by

BIDDLE, J.—A water-course now exists from complainants' land on the east side of Bridge street to Little Tacony creek. By permission of councils, complainants constructed a brick culvert under and across Bridge street, through which the water runs to other property of complainants, and over that property six hundred and sixty feet to Frankford street. It then crosses Frankford street, and thence into a natural run which empties into Little Tacony creek. The city councils recognizing apparently the importance of not obstructing this water-course, in November, 1874, passed an ordinance directing the construction of a brick culvert at and near the intersection of Frankford and Foulkrod streets. When this is completed it is admitted that all cause of complaint will be removed. One of the respondents, however, who has a contract with the city, dated December 2, 1874, for grading Foulkrod street, from Bridge to Frankford street, claims the right to fill up the water-course on or near the intersection of Foulkrod and Franklin streets, without waiting until the culvert has been constructed by the city. By so doing very great, and perhaps irreparable damage, will be inflicted upon the complainants, and much unnecessary expense entailed on the city.

It has been argued that this water-course is not a natural water-course, but an artificial one, created by the complainants themselves, and that therefore they have no right to ask the protection of a court of equity, to restrain its wanton obstruction. Whether the water-course is natural or artificial it is extremely difficult to determine, upon the affidavits presented. They are about equal in number on both sides, and quite as positive. The truth probably is, that the water-course is partly natural and partly artificial. But of what moment is that question here? That there is an existing water-course, draining a large amount of territory, and protecting complainants' brick yards, covering over twenty-four acres, from being submerged, is not denied. Neither is it denied that the councils of our city, with a proper regard for the interests of complainants and others, have ordered the construction of a culvert which will protect them from all damage when the streets are graded. This ordinance was approved by the mayor on the 17th day of November, 1874, and on the 1st day of February, 1875, proposals were issued by the proper officer for its construction. Why then should the parties who received a contract on the 2d of December, 1874, for grading Foulkrod street, commence this work in a way to do the greatest damage to property owners, and to cause the greatest inconvenience to the city authorities, when he had full notice of what the authorities intended to do, before he received his contract?

We confess our inability to answer this question, and therefore refuse the application to dissolve this injunction.

H. M. Dechert, Esq., for plaintiff.

George Peirce and W. Hopple, Jr., Esqs., for defendants.

[Leg. Int., Vol. 32, p. 134.]

LOEB vs. HENSEY.

An express warranty or fraudulent misrepresentations must be proved when the defence is, that the animal purchased was not as represented.

Opinion delivered *April 10, 1875*, by

BIDDLE, J.—We have read the voluminous depositions, taken on both sides, in this case, and are unable to arrive at the conclusion that the judgment should be opened.

The cow purchased by the defendant may not give as many quarts of milk as was represented, but neither an express warranty nor fraudulent misrepresentation, on that point, has been proved, and we therefore think the rule should be discharged.

J. H. Cotton, Esq., for plaintiff.

D. M. M. Collins, Esq., for defendant.

[Leg. Int., Vol. 32, p. 134.]

BRINCKLE vs. BRINCKLE.

An answer or a plea should have the same caption or superscription as the suit. An admission of the allegations in a declaration is not presumed because the plea has the same caption as the declaration.

Rule to strike out "D'henin suing as" and "Angelique D'henin suing as" in the title and superscription of the answer filed by respondent. Opinion delivered *April 10, 1875*, by

BIDDLE, J.—The proper administration of justice and the orderly arrangement of the records of the court require that the pleadings and all other papers filed in the prothonotary's office shall be entitled of the cause to which they relate. The truth of the matter in controversy is a question of evidence, and cannot be determined or influenced by the assumption of either party. No one surely is presumed to admit the allegations in a declaration, because, in filing his plea, he has given it the same caption.

Judge Allison, in *Howard vs. Lewis*, 6 Phila. Rep. 50, refused to permit a woman, alleging a void marriage, to sue in her maiden name. He required her to appear as a wife by her next friend. We think, therefore, there is no hardship in requiring an answer, even though it denies any marriage, to take the same orderly and formal shape, and to be entitled of the proceeding of which it forms a part.

This rule is made absolute.

C. W. Katz, Esq., for plaintiff.

Hon. F. Carroll Brewster, contra.

[Leg. Int., Vol. 32, p. 142.]

GARRETT vs. MULLIGAN.

Where A and B occupied separate floors of the same building, and A had allowed B to believe before he took the lease that he would not object to a sign on the balcony of the second floor—*Held*, that A could not restrain B from putting up a sign there.

Application for injunction. Opinion delivered *April 17, 1875*, by

BIDDLE, J.—The testimony submitted in this case shows that the owner of the property, No. 708 Chestnut street, having offered to let it, was

applied to by the complainant and the respondent on different occasions to rent portions of it, one wishing the upper stories, and the other the lower. He declined to rent the property except as a whole, but his agent brought the parties together, saying to them, that if they could make satisfactory arrangements between themselves, so that the rent of the whole building would amount to five thousand dollars, he would give them separate leases, reserving such rent for each portion of the house as they should decide to be equitable. This was done, and each party took his lease, the complainant leasing the upper stories, and the respondent the lower. As far as their relations with the landlord are concerned they stand upon precisely the same footing, there being nothing in either lease to enlarge or modify their rights to their respective portions of the premises.

The respondent has put up a sign against the iron railing of the balcony fronting the second story, and this the complainant asks us to require him to remove.

The only question in this case is, did the complainant agree that this should be done? If he did not, we find nothing in any part of the testimony to justify it.

There appears to have been considerable negotiation between the parties before they signed the leases relative to their joint occupancy of the building, and among other matters, the question of the sign was discussed. The respondent swears positively that his wish to place his sign across the balcony was distinctly stated, and as he understood, entirely acquiesced in by complainant. That he said to complainant that he would not take the lower story without that privilege, and complainant asked if he wished to make an arch over his sign, and being assured he did not, appeared perfectly satisfied. This is confirmed by the only witness who was present at the discussion. The argument of complainant's counsel states their answer thus: "We admit Mr. Garrett did not make any strong objection to its going there, not because he had no great objection to its going there, but because, as he says, he did not consider it necessary to extend his remarks, as there were no negotiations then pending, and he felt he was in no way subject to or under Mr. Mulligan's control."

Accepting this as a correct summary of his testimony, does it mean anything else than that the complainant voluntarily permitted the respondent to entertain the belief, that if their negotiations came to a successful termination, he was to be allowed to place his sign where it now is?

In no subsequent interview is there any allegation that the complainant ever endeavored to correct this impression. That he knew it existed we can have no doubt. When asked by his counsel: "Then it was not understood between Mulligan & Co. and you, that the sign was to be placed where it now is?"—the answer was very guarded and very significant. "It was not, so far as I am concerned;" thus confirming the allegation of the respondent, that he believed it to be the agreement, and that complainant knew that he believed it. We think that it is rather late now for the complainant to give vent to those "strong objections" which he previously thought it expedient to repress. Having permitted the respondent to incur responsibility and expense on

the faith of his silence and presumed assent, the law will imply an actual assent: Chitty on Contracts, page 61.

We regard this to be a parol license given to the respondent, upon the faith of which he leased a portion of this property and expended a considerable amount of money in adapting it to his purpose. This would constitute at law a good defence: See *Kerick vs. Kern*, 14 S. & R. 267.

There is no evidence that the sign is of unusual size, or that the respondent has done any more than by a fair construction of this license he had a right to do.

The application for an injunction is therefore refused.

William G. Foulke, Esq., for plaintiff.

R. P. White, Esq., for defendant.

[*Leg. Int.*, Vol. 32, p. 150.]

In the matter of the Petition of Citizens for a Jury to report to the Court for or against the opening and straightening of GIRARD AVENUE THROUGH GIRARD COLLEGE GROUNDS.

As the jury appointed to report on the opening and straightening of Girard avenue could not agree on a report, the court have the power to appoint another jury.

Opinion delivered *April 24, 1875*, by

ALLISON, P. J.—This petition recites the petition filed in December, 1873, in the Common Pleas, to report for or against the opening and straightening of Girard avenue, and the opening of Twenty-second street through Girard College grounds.

The fact is stated, that the jury reported against the opening of Twenty-second street, and were equally divided in opinion as to Girard avenue.

The petitioners pray for a jury to report to the court, for or against opening or straightening said avenue through the grounds of the college. This is resisted, for the reason, that the power of the court is exhausted; that the act of the 21st of June, 1873, being a special act, giving to the Court of Common Pleas authority to appoint a jury of view, and the power of appointment having been exercised, there can be no other jury after confirmation of the report. That the jurisdiction is exceptional and peculiar, must be admitted; the Court of Quarter Sessions have general jurisdiction over roads and streets, and have had from the early settlement of the province down to the present time. In Philadelphia there have been no more than two instances, of which we have knowledge, in which power over streets was attempted to be given to the Common Pleas; but this is no reason against the exercise of the power by this court, if the Legislature, having entire control of the subject, give to it jurisdiction; and so far as the execution of the power was concerned, in 1873, it was, as between the Quarter Sessions and the Common Pleas, a difference of designation of court more than of substance. The same judges constituting both courts, and passing upon questions at the same sitting in each court, entitling their proceedings as of the court to which it properly belonged.

But the question upon which we are required to pass under the present petition and objections, does not so much relate to the subject of

jurisdiction, touching the power to appoint a second jury after a jury first appointed had performed the duties, which devolved upon them under the act of 1873, as it does to the consideration of the case as it now stands before us, upon a failure of the jury appointed under the first petition to agree upon a finding. The act says, the jury shall report to the court *for or against* the opening and straightening of Girard avenue through the college grounds; they have done neither, being unable to agree by a majority of their number upon one alternative or the other. The act directs the court upon reaching a judgment that these streets might be opened under the will of Stephen Girard and existing legislation, essential to the faithful execution of the trusts, to appoint a jury to report to the court *for or against* the opening and straightening of the avenue, and the opening of Twenty-second street. The act further directs, that the appointment should be made in accordance with existing laws; what existing laws? obviously the general laws, giving jurisdiction and power to the Quarter Sessions; there were then, and are now, no other laws in force upon the subject; this, therefore, can be regarded, it seems to us, in no other light, except that of making applicable to these two streets by petition in the Common Pleas, the general road laws then in force, so far, at least, as it was necessary to invoke their aid in carrying out the conditional directions of the act. Under this view of the subject how does the case stand before the court? A jury appointed to do one or the other of two things specified in the act, and a report that they have done neither, because they have found it impossible to come to such an agreement as is contemplated by the law, which requires that at least five of the six viewers shall examine and view, and four of them must agree to make a report; the act declares, that a view which may be had for any purpose, shall not be "good and valid," unless four of the actual viewers concur in the report. We have, therefore, a return which, as to Girard avenue, was not a good or valid report; it is rather to be regarded in its application to the avenue, as no report at all; it is but a statement of the fact that they were not able to report, because four of their number could not concur.

It is very clear to us, that the petitioners are entitled to a jury, who will make a legal report to the court; it is in no respect different from any other mistrial, which is no trial at all, and that upon general principles applicable to analogous cases, as well as the unquestioned power under the general road law, another jury ought to be appointed. This, indeed, would seem to have been in the mind of the Legislature when the act was passed. After directing the court to appoint a jury, who are to make report within sixty days after their appointment, it contains the provision, that upon the confirmation of the report of *any such* jury, directing the aforesaid Girard avenue and Twenty-second street, to be opened, etc. It will be observed, that the act does not refer to the confirmation of the report of a particular jury, to be appointed, or said jury, or such jury, but *any such* jury. This is to be taken in connection with the fact, that the act contemplates ulterior proceedings to assess damages by a jury, if a report in favor of opening should be confirmed; which looks very much as if the whole proceeding, in every stage, should conform to the general road laws, applicable to proceedings in the Quarter Sessions: *Esterley's Appeal*, 4 P. F. S. 192; *McMullin* vs.

McCreary, Id. 230, and *Wright vs. Davenport*, 16 Id. 148, are all relied upon by the objectors to the appointment of the jury, as supporting their view, that the court is without jurisdiction. The first two cases are authority merely for the general principle, that an act which is out of the course of the common law, ought to be strictly construed: *Wright vs. Davenport*, it is claimed, is almost identical with the present case. It differs in two very material respects from that which is now before us. First, it created a special tribunal of three auditors to report upon the honest or fraudulent management of an insolvent bank, after an assignment, and is unlike the act of 1873, giving power to a court of extensive general jurisdiction, the judges of which possess like general authority, when holding a Court of Quarter Sessions; and in the second place, the special tribunal or board of auditors performed the duties and exercised the power conferred by the act, they made a valid and legal report to the court, by whom they were appointed; this, as we have seen, the jury under the first petition as to Girard avenue, did not do. We do not, for these reasons, regard the case of *Wright vs. Davenport* as ruling the question before us. We dismiss the exceptions, and will appoint the jury for which petitioners pray.

John S. Gerhard and *E. Spencer Miller*, Esqs., for the petitioners.

W. H. Rawle, *F. C. Brewster*, and *William A. Porter*, Esqs., against the prayer of the petitioners.

[Leg. Int., Vol. 32, p. 150.]

EDWARD CROSDALE vs. CYRUS CADWALLADER.

A *fi. fa.* was indorsed interest "from December 30, 1873," the facts being that 12 per cent. interest had been paid for that year: *Held*, that a rule would be granted to correct the said indorsement to "interest from December 30, 1874." The application was made by the terre tenant, and the court held that he was entitled to take credit for the excess of legal interest.

Opinion delivered April 24, 1875, by

ALLISON, P. J.—This is a rule to show cause why *fi. fa.*, under which real estate of the defendant has been levied upon, should not be indorsed "interest from December 30, 1874," instead of "interest from December 30, 1873." The defendant executed a judgment note for two thousand dollars, in favor of plaintiff, on the 30th of December, 1872, on which is indorsed "interest paid to June 30, 1873," and "interest paid to December 30, 1873."

The terre tenants, who take this rule, have received the land levied upon from the defendant by a decree in equity upon a creditor's bill.

The ground upon which this rule is taken is, that interest at the rate of 12 per cent. was paid for the use of the money; and that as this was double the amount legally demandable, and having been paid as interest upon the loan, the credit should be carried to the end of 1874 instead of 1873.

Upon the argument, the payment of double interest was not denied, and the depositions of plaintiff establish the fact, even if there had been a dispute upon this point.

In *Fisher vs. Kahlman*, 3 Phila. R. 213, the District Court decided that where usury avoids the contract, the defence is personal to the

party to whom the loan was made. But so far as it amounts to a *pro tanto* failure of consideration, it is very clearly settled that the plaintiff will be enjoined from the recovery of more than the just sum advanced, and lawful interest thereon. A terre tenant was allowed to take defence to a mortgage to the extent to which it could be shown to be usurious; the court say, it seems right, in the case of a purchaser, to show that the security is for more on its face than was actually advanced at the time. In *Greene vs. Tyler*, 3 Wright, 361, it was held that the owner of a usurious mortgage cannot, even with the consent of the mortgagor, apply partial payments to the unsound part of his mortgage for the purpose of keeping alive that part which is valid, to the prejudice of an existing subsequent mortgagee. The question arose, upon the trial of the feigned issue, upon the application of a subsequent mortgagee, to ascertain how much was due on the first mortgage, and what part of it was founded on usurious consideration. The court below instructed the jury that although the contract was usurious between the parties, yet the plaintiff in the issue could not set it up; but this ruling was reversed upon the principle, that as against the debtor only, the principal debt and legal interest could have been legally demanded, no more could be legally demanded as against the subsequent mortgagee.

The question, whether any but the borrower or debtor can set up the defence of usury under the act of May 28, 1858, was made in the case of *Verner vs. Carson*, 16 P. F. S. 440, but was not passed on by the court. The case is decided on the ground that the judgment was binding and conclusive on the parties until reversed or set aside. This case is relied on by the plaintiff as conclusive against the present application, and if this was an effort, as plaintiff seems to regard it, to impeach his judgment collaterally, he would be justified in asking that the rule taken in this case should be discharged, but we think he misapprehends the pending application. The judgment is not questioned, and is about to be enforced by execution, but there has been payment of interest on the judgment, and the question is, in what amount, and to what time, does the payment extend? The credits indorsed on the back of the note are not conclusive, but may be corrected by the admissions of the parties, or by the proofs taken in support of the application to control the execution, and have it represent the amount due by the payment of interest upon the note. This question of fact the plaintiff would be entitled to have tried by a jury, but he has not asked for an issue, and has been content to have the question of fact decided by the court upon depositions. The cases of *Fisher vs. Kahlman*, and *Greene vs. Tyler*, support the terre tenant in his claim to maintain the present application for relief; and as the fact is proved that legal interest up to December 30, 1874, was actually paid by Cyrus Cadwallader, the execution ought not to be allowed to be enforced for a larger amount of interest than is due.

Rule absolute.

Rufus E. Shapley and *William L. Hirst, Esqs.*, for the rule.
Hunsicker, contra.

[Leg. Int., Vol. 32, p. 179.]

BEAVER vs. NUTTER.

A erected a wall on his own lot and partly on the adjoining lot, which he subsequently purchased; he afterwards sold the built-up lot, reserving the half of the party wall nearest to the vacant lot, and also sold the vacant lot to another person. *Held*, that A did not thereby dispose of his interest reserved in the wall, as it was a party wall. If the wall had been wholly laid upon the land of the plaintiff, it could not be considered a party wall.

In equity. Motion to dissolve special injunction. Opinion delivered May 11, 1875, by

ALLISON, P. J.—The contest in this case is over the ownership of a party wall.

The plaintiff was the owner of the house and lot mentioned in the bill of complaint, which he conveyed to one Tully, reserving to himself the west party wall. Before his conveyance to Tully, he also owned the adjoining lot or piece of land on the west, which was not built upon, and which he sold and conveyed to Maria L. Rogers, from whom defendant derives title. It was admitted upon the argument though it is not set out in the bill, that at the time when the wall in dispute was built, the vacant lot belonged to a third person, and that Beaver subsequently acquired the lot by purchase. Upon this admitted fact the controversy must be determined in favor of the plaintiff. The wall when it was built was a party wall, built between party and party. The foundations were laid half and half on the lands of adjoining owners, and it was carried up in this way as a party wall in the construction of the house of the plaintiff, who thereby acquired an easement upon the land of his neighbor—the right to use four and a-half inches of his land in the building of his house. This right thus acquired, he continued to enjoy, until he became the owner of the entire lot of ground, including the servitude, which then merged, and for the time being, by unity of title of both properties, was suspended and held in abeyance. The easement was swallowed up in the higher title of the fee of the adjoining lands. Holding both properties in his own right the relation of party and party no longer existed; but did this unity of title extinguish or merely suspend the easement? The principle which answers this question is clearly stated in Gale and Whateley's Law of Easements, 52. "It is true, a man cannot subject one part of his property by an easement, for no man can have an easement in his own property; but he obtains the same object by the exercise of his right of dominion over his property; he has not thereby altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alienates one part of it, if the alterations are palpable and manifest, the purchaser takes the land with the qualities which the previous owner attached to it."

If the owner of land can create incumbrances in the nature of easements, what is there to prevent him recognizing as subsisting and continuing easements, such as come to him by purchase of the land, which easements were created by former owners? This question was considered in *Worne vs. Marsh*, 6 Philada. Rep. 33. The authorities bearing on this subject are there considered, and the doctrine established in *Keiffer vs. Imhoff*, 2 Casey, 442, applied to the case of an easement of an alleyway created upon adjoining properties, both of which

properties were afterwards purchased separately by the same person ; it was held that the easement was not extinguished by the mere unity of title which revived upon subsequent severance. In *Keiffer vs. Imhoff*, the court say : the *right* remains as before, under a higher title, and upon a subsequent severance of the estate by alienation of a part of it, the alienee becomes entitled to all the continuous and apparent easements which had been used by the owner during the unity of the estate. In the case stated in the bill the easement was the party wall laid by Beaver on the land of the adjoining owner on the west, and which also gave to that owner an easement upon the land of plaintiff, consisting of the right to use the portion of the wall which had been erected on his own ground. This servitude was open and manifest so that a purchaser would buy with notice : to view the land was sufficient to put him on the inquiry. When plaintiff bought the vacant lot, he bought the easement with it, and when he sold to Maria L. Rogers, she took with the plainest constructive notice of the existence of the servitude, and when defendant took title from Miss Rogers, the notice was equally binding on him, that half of the party wall was laid upon her land. This, we think, is conclusive of the question at issue between the parties, and requires us to hold, that the wall is a party wall, that as such it never was lost to plaintiff, that though the easement was suspended during his ownership of both properties, the right remained, and upon severance of title, revived in full force, so that when he sold the house and lot on the east to Tully, it was competent for him to reserve the party wall to himself.

To the other points made by the defendant, the reply is : That mere notice that a third party claims a party wall, unsupported by proof of title, will not prevent an injunction to restrain its use. An injunction will be granted to prevent the further use of, or breaking into a party wall, where, without fault or consent of the owner, the first floor of joist had been inserted into it. The act requires that the first builder shall be reimbursed before the next builder shall *in any wise use* or break into the wall. It is in the alternative, use or break into ; the second builder has no more right to use the wall "in any wise," than he has to break into it, without first making compensation. Nor does knowledge that a cellar for an adjoining building is being dug out, amount of itself, to negligence on the part of the owner of the wall.

That we may not be committed to the principle upon which the case rests as it is stated in the bill, we deem it proper to add, that had the wall, when built, been laid wholly on the land of the plaintiff, it could in no proper sense be regarded as a party wall. An owner may build within and upon his own lines as he pleases, subject, of course, to the general principle, that in so doing he does no wrong to his neighbor, and is observant of all legal municipal regulations upon the subject. It requires no act of assembly to empower an owner to build upon his own land ; but it is necessary that such authority should be found, as a justification for entering upon the land of an adjoining owner, lay out and build upon it a wall to be used in the construction of a building upon his own lot of ground. This principle is recognized, as it seems to us, beyond all question, in the act of February 24, 1721. Surveyors or regulators are given full power and authority upon application made to them, to enter upon the land of any person or persons, in order to set out the foundations and regulate the walls to be built, as stated in the

act, "*between party and party.*" A man cannot be a party with himself. There must, of necessity, be an adjoiner, whose land is to be used in part, in the construction of a wall by a first builder. The act has still more to say upon this point, "which foundations shall be laid equally upon the lands of the persons, between whom such party wall is to be made." The property and the owners are both in the plural, in this connection, showing an obvious purpose to keep clear the distinction which determines the application of the law, namely, separate owners. For whatever may be said of the use of the word lands, as indicating a division into pieces or lots of ground of a larger lot, the use of the word *persons* between whom such wall is to be built, shows that it refers to different persons, owning separate pieces of land.

This interpretation of the act of 1721 does not prevent an owner, when he comes to sever his land, and convey it to his different purchasers, imposing whatever conditions may be agreed upon between himself and his grantee. He may reserve his right to compensation for the use of the wall of a building first erected by himself wholly upon his own land, and whether as between a grantor and grantee, it is called a party wall, or called by any other name, the contract having a sufficient consideration to support it, will be enforced; but where such an agreement is wanting, there can be no claim successfully maintained upon the basis of its being a party wall. This view of the law is supported by the cases decided by the late District Court, of *Oat vs. Middleton*, and *Norris vs. Adams*, 2 Miles, 248, 337, and the later case of *Doyle vs. Ritter*, 6 Philada. Rep. 577, decided in 1868. In the opinion of the court by Hare, P. J., the point is thus stated: When a house is built on a dividing line between two lots owned by the same person, the whole is his, and it is not necessary to consider how much of the building rests on one lot, and how much on the other. What is done is done by virtue of his title, and there is no room for the operation of the statutes, which were only meant to apply where land is owned by different persons, and where it would be a trespass to erect a party wall without an authority in law.

In *Pratt vs. Meigs*, 2 Parsons' Equity Cases, 302, this distinction is also taken. The main design of the law is said to be for the mutual accommodation of the owners of adjoining lots, where one was about to erect a building where the wall might ultimately prove beneficial to the second builder. Lowrie, C. J., in *Roberts vs. Bye*, 6 Casey, 375, says: A right to a party wall is a right which an owner of land has to build a division wall partly over his line on the land of another. Upon principle and authority, as well as the clear intent of the act of 1721, we conclude that *per se* there can be no party wall, which is built wholly on the land of the first builder. We have said this much upon the question, that our understanding of the law may not be misapprehended. The case of the plaintiff is supposed to be supported by *McGittigan vs. Evans*, 8 Philada. Rep. 264. If the plaintiff rightly interprets *McGittigan vs. Evans*, we are still compelled to adhere to the view above expressed, which accords with the interpretation we have frequently given to the act of 1721, and which is supported by all the other authorities bearing upon the question.

The motion to dissolve the injunction is refused.

L. R. Fletcher, Esq., for plaintiff. *G. Harry Davis*, Esq., for defendant.

[Leg. Int., Vol. 32, p. 183.]

MCGLUE vs. THE CITY OF PHILADELPHIA.

By the act of April 21, 1858, it is provided, that no contract shall be binding upon the city of Philadelphia unless an appropriation sufficient to pay the same be previously made by councils. *Held*, that where an appropriation was made sufficient at the time to pay the contract in full, a subsequent diversion of the same to other objects by the city left the city liable as though such diversion had not been made.

It was admitted in the case stated that the original appropriation by councils was sufficient to satisfy the plaintiff's demand.

Opinion delivered May 21, 1875, by

ALLISON, P. J.—The facts which are stated for the opinion of the court present but one question for decision: Is the contract, which was entered into between E. S. McGlue and the city of Philadelphia, a valid and binding contract, to the extent to which an appropriation had previously been made by councils for payment?

It is admitted that on the 18th day of May, 1874, an agreement in writing was entered into by the parties to this action, whereby the plaintiff bound himself to do all work and labor required in completing the earthwork at the storage reservoir, in East Fairmount park, and also to furnish seed of the best quality for seeding the outer slope of the reservoir, for which the defendant agreed to pay the plaintiff the price of eighty cents per cubic yard.

One million three hundred and twenty-five thousand dollars was appropriated by ordinance passed the 6th of November, 1871, for payment of the work; a portion of the unexpended balance of the appropriation which was in the treasury at the time the contract was made had been expended or appropriated by councils for other work when he demanded payment, and the amount then remaining was not sufficient to pay the plaintiff according to the terms of his contract.

The plaintiff claims that he is entitled to have judgment entered in his favor for \$58,312.96, which amount, by the certificate of the chief engineer of the water department, is due to him for work done under his contract, between the 16th of September, 1874, and the 21st of December, 1874.

The 5th section of the act of April 21, 1858, P. L. 386, provided, "that no debt or contract hereafter incurred or made shall be binding upon the city of Philadelphia, unless authorized by law or ordinance, and an appropriation sufficient to pay the same be previously made by councils; provided, that persons claiming unauthorized debts or contracts may recover against the person or persons making the same."

This contract was authorized by resolution of the select and common councils of the city, approved by the mayor on the 12th day of May, 1874. It has, therefore, the requisite first mentioned in the 5th section of the act of 1858 to support it. It was authorized by a law of the city, duly passed in the form of a joint resolution, which brings us to the consideration of the only remaining question: Is the contract valid and binding on the city to the extent to which an appropriation had been previously made to pay for the work to be done under it?

We think it is clear, beyond all reasonable question, giving the strictest possible construction to the 5th section of the act, that a con-

tractor is entitled to be paid for work done under his agreement to the full amount of a previous appropriation; that he is not responsible for a diversion of a portion of it by councils to other purposes, or to other persons, and, as in this case, which is presented for the decision of the court, more than the amount for which judgment is sought to be recovered against the city, to wit, the sum of \$58,312.96, having been appropriated for the construction of the reservoir before the execution of the agreement of the plaintiff with the city, and this, too, beyond the amount which has been paid to him for work done under his contract prior to the 16th day of September last, he is entitled to a judgment in his favor.

This would seem to be the construction which councils have given to their agreement with plaintiff. The resolution of May 13 directs the city solicitor to resist and defend the suit brought by Mr. McGlue against the city for alleged work done to the east park reservoir, beyond the amount appropriated for the purpose. If, by the phrase "beyond the amount appropriated for the purpose," councils are to be understood as referring to the unexpended balance of \$38,612.83, leaving out of the account the \$76,205.80, paid to persons other than the plaintiff, and that this is the extent of their liability to him, we think the view which they take of the question is a mistaken one. A contractor is not bound to look to the action of councils subsequent to making an appropriation; if they carry the money away from him and award it to others, that is a matter which concerns them and not the person with whom they have contracted. He cannot have his rights prejudiced by action of councils, for which he is in no degree responsible, and which he could in no manner control.

It will not be overlooked that all we have said is based upon a conceded application of the 5th section of the act of 1858, to the instance of a contract, made directly by the councils, in the exercise of their law-making power, and not through the agency of the city commissioners or heads of department. If it were necessary to decide whether councils were subject to the 5th section of the act of 1858, it is by no means clear that it is applicable where councils are themselves the contracting party.* It is not necessary to decide the question in this case, because the present claim of the plaintiff has a law of councils to support it, and a previous appropriation sufficient to cover it; and as there is no dispute as to the amount of work done, or as to the manner in which it has been performed, we enter judgment upon the case stated, in favor of the plaintiff, for the sum of fifty-eight thousand three hundred and twelve dollars and ninety-six cents (\$58,312.96).

The contract with the plaintiff was not for a round sum; it was an agreement to pay for the work at a fixed price per cubic yard, and although it contemplates the completion of the earthwork of the reservoir by the plaintiff, in conformity with specifications which are made part of the contract, the sum which he will be entitled to claim against the city can only be ascertained by measurement when the work is completed. It may amount to more or less, according to the manner in which the reservoir is constructed. In contracts of this character there is generally contained a clause providing for necessary variations as the

* This point has since been expressly decided by the Supreme Court, *Tutham's Appeal*, 30 P. F. Smith, 470.

work progresses; these variations may consist of omissions, or of additions, so that the sum which the contractor will be entitled to claim is contingent. As a rule, there can, in every case of the fund, be no appropriation of an exact sum in advance for payment of all that will be due to the party who is to perform work or furnish material to the city. A mistake in the amount of the appropriation, of a sum less than should be found requisite to pay all that had been earned under the agreement, would, under this view of the law, relieve the city from liability to pay anything, the section providing, as it does, that no debt or contract shall be binding on the city, unless an *appropriation sufficient* to pay the same be *previously* made by councils. This construction of the law would work such manifest injustice, and would be so utterly incapable of a practical application to the wants of the city as to require its rejection, unless we are absolutely shut up to its adoption by the imperative directions of the act, interpreting it not only according to its letter, but by its clear intent as well.

The most that can be claimed under the 5th section is, that a contractor, who undertakes to perform work for which he is to be paid at a fixed price, according to the amount of the work done, shall see that from time to time, as the appropriation is exhausted, if it is less, in the first instance, than is required to pay for everything to be done under it, that councils shall make further appropriation before proceeding to the completion of the work; but even this would not be in strict conformity to the language of the section to which attention has been called, for that looks to a sufficient appropriation before the contract is entered into, and not to appropriations to meet payment as the work progresses. But if this be the correct interpretation of the section, what becomes of a contractor who, as in this instance, and it is by no means an uncommon one, is under a heavy penalty to finish his work by a certain time? This places him between two fires; he must take the risk and go on with his contract, in the absence of an appropriation, or he must assume the other risk of the penalty for delay enforced against him.

William B. Mann, Esq., for plaintiff.

C. H. T. Collis, Esq., for defendant.

[Leg. Int., Vol. 32, p. 208.]

HULSEMAN vs. GRIFFITHS.

In an action for ground-rent the principle that a tenant is estopped from denying his landlord's title has no application.

To such claim a constructive eviction under a paramount title is an answer, although no actual ejection was brought.

Rule for judgment for want of a sufficient affidavit of defence. Opinion delivered *June 5, 1875*, by

BIDDLE, J.—This is an action of covenant to recover one year's ground-rent, due April 1, 1875. The affidavit of defence sets out, that before the execution of the ground-rent deed on which this suit is brought, there had been filed on the 14th of September, 1857, within six months after the work was done, a municipal claim against all the lot, subject to the ground-rent, excepting about three feet. That under this claim a sheriff's sale was had, and the purchaser obtained a sheriff's

deed therefor, in due form, dated July 14, 1860, and acknowledged the same day in the Court of Common Pleas, and duly recorded. That the purchaser of the property made claim for the same, and the defendant, under threat of ejectment, by advice of counsel, purchased and took a deed therefor, dated March 13, 1875.

It is contended, however, by the plaintiff: First. That the defendant is estopped from denying the landlord's title; and second, that his eviction must be actual, and not constructive.

The equitable estoppel contended for does not arise except in those actions where the possession of the estate is brought in question, and as this is not a suit to recover possession, the doctrine has no application: See note to *Smith's Leading Cases*; *Doe vs. Oliver*, 680.

An actual eviction under a prior and better title, from the greater part of the demised premises, is certainly *pro tanto*, a defence to an action for the rent, which, in such case, should be apportioned: *Garrison vs. Moore*, 1 Philada. Rep. 282.

The only question here is, whether it is necessary that this eviction should be actual. The modern doctrine on this subject is stated generally by Chief Justice Gibson, in *Clark vs. McAnulty*, 3 S. & R. 372. "The law does not require the idle and expensive ceremony of being turned out by legal process, where that result would be inevitable." This doctrine has been applied in the cases of landlord and tenant, where the equitable principle of estoppel, from denying the landlord's right of possession, is involved, and it has been held in *Smith vs. Shepard*, 15 Pick. 147; and *Welch vs. Adams*, 1 Metcalf, 494, that in an action for rent brought by a mortgagor against his tenant, who had been obliged, in order to avoid an ejectment under a mortgage prior to his lease to pay rent to the mortgagee, a plea of the special circumstances of the case was good as amounting to an eviction, although the tenant had remained in possession.

A conveyance in fee reserving ground-rent to the grantor, as in this case, is more analogous, as far as the rights and obligations of the parties are concerned, to the case of vendor and purchaser, where the possession has left the vendor never to return. The authorities relative to eviction upon covenants for title and payment of purchase money, will all be found classified and discussed in Mr. Rawle's valuable treatise, entitled, "Covenants for Title," chap. VII., page 177. He concludes, page 249, "That the weight of authority is in favor of the position that a purchase by a covenantee of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction as will entitle him to damages upon his covenant for quiet enjoyment, measured by the amount he has thus paid."

We think, therefore, the defendant in the present suit is entitled to an opportunity to support his allegation of eviction, by proving the peculiar circumstances which he thinks in effect constitute it.

Should he, in the meantime, be satisfied of the validity of the title purchased by the defendant, and that it is an elder and better one than his own, he can avail himself of the offer of the defendant to transfer it to him for the same consideration he paid for it.

This rule is discharged.

R. P. White, Esq., for plaintiff.

J. B. Townsend, Esq., for defendant.

[Leg. Int., Vol. 32, p. 238.]

**THE ATTORNEY-GENERAL vs. THE LOMBARD AND SOUTH STREETS
PASSENGER RAILROAD COMPANY.**

1. A railway cannot occupy a street with its track, even temporarily, unless such right is clearly conferred by its charter.
2. The councils of a city cannot confer such right; but only the people of the whole State by their Legislature.
3. The unauthorized occupation of a street by railway tracks is a nuisance *per se*, which equity will restrain, upon information of the attorney-general, without a preliminary trial at law.

Opinion delivered *June 26, 1875*, by

ALLISON, P. J.—This bill is filed by the attorney-general in behalf of the Commonwealth, to prevent the defendants laying a railway track on Broad street, between Passyunk road and Snyder street.

The case stands before us upon the information or complaint of the attorney-general, unanswered by the defendants, and without even a denial by affidavit of any of the grounds upon which the bill is founded. The violation of public right, charged against the defendants, must, therefore, be regarded as admitted, unless, indeed, the statement made upon the argument, that the councils of the city had granted permission to defendants to lay the tracks as a temporary expedient merely, should avail as a defence to the prayer of the bill. It is not pretended that the Legislature, in prescribing the route of the defendants, granted to them the right to occupy any portion of Broad street, or that, by necessary implication, such grant can be inferred from the clear and unquestionable rights conferred by their charter. It is true that the company, defendant, may not at once be able to enjoy all the benefits, which, under their charter, may accrue to them, and it is because, as they allege, they cannot make the desired connections upon the route, prescribed in the act of assembly, until Snyder street is opened, from Passyunk avenue to Broad street, that councils have granted them permission to lay the track on Broad street. But this clearly is a justification which cannot be properly pleaded in answer to the charge, that the Legislature has not granted the right to lay a railway track on Broad street. The defendants accepted their corporate privileges with the knowledge that this part of Snyder street was not a street opened to public use, and that, by the terms of the grant, they were postponed in the ability to make the proper connection, and thus complete their route, until, by due course of law, Snyder street should be opened. As this privilege to lay the track objected to is not found in the law incorporating the defendant, or in the supplement thereto, and as it is not a clear and absolute necessity, to the enjoyment of franchises expressly granted, it must be taken as denied to the defendant. All powers not given to a corporation, in this clear and unmistakable manner, are withheld. That such a power as this cannot be taken by implication, except where the absolute necessities of the case demand it, is evident from the fact that it is the making of a new and additional railway, or it is an extension of a railway upon a street which the Legislature has not permitted to be thus encumbered. Considerations of convenience to the public, or of advantage to a company, cannot support a claim of this character, and as was remarked in

3 Casey, 351, it is strange, that a company, which has transgressed the limits of its charter, should come into court with the faintest hope of being sustained. It does not even stand upon a doubt in its favor; if this were even so, the claim would be rejected; for to doubt on a question of a grant of corporate franchise, is to reject the claim; a doubtful charter does not exist. In the case before us, the defendants have literally nothing which can rightfully be urged in support of their use of Broad street.

The essential element of a grant of right to construct a railway, as distinguished from a railroad, is the privilege of occupying, so far as is necessary, a street or road which has been taken for common or public use as a highway, with a track or tramway upon which to run the cars of the corporation. It is not a grant of exclusive privilege to use the street. The enjoyment of the use is in common with every other use to which it may, of right, be appropriated by the public, and being in aid of the right of travel upon the highway, is entirely consistent with the essential purpose for which a road or street is established. But when a claim is set up of a right to occupy any portion of a street with a railway track, it can only be successfully supported by pointing out the grant from the Legislature, expressed in no uncertain or doubtful terms. Since the decision in 6 Wharton, 25, in the case of the Philadelphia & Trenton Railroad Company, the doctrine has been firmly established in Pennsylvania, that a highway belongs to the people, not of a particular district or municipality, but of the whole State, who may dispose of it and control its use by their representatives at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control, and no person, natural or corporate, remarks Chief Justice Gibson, has an exclusive interest in the trust, unless the State has granted it to him. This control over the highways is based upon the sovereignty of the people in Pennsylvania, and is supported by the equitable consideration of the six per cent. thrown into every public grant, or compensation for what may be reclaimed for roads. The wisdom of the doctrine, so clearly stated in 6 Wharton, has often been questioned, but has never been departed from. On the contrary, whenever the question has reappeared in the Supreme Court, it has been adhered to. It was, no doubt, intended to correct the statement of the law, as laid down in *Barter vs. The Commonwealth*, 3 Pennsylvania R. 259, that the title to the soil of a street is in the municipal corporation, instead of in him who owned it before the street was laid out; but even this, it was held, could not impair the public right of way over it, or prevent the Legislature from modifying, abridging or enlarging its use. It may even abolish the use by vacating the street, a power which has been exercised for many years without question.

The exercise of this power is always to be regarded as reserved by the people of the Commonwealth to themselves; their hold upon it is never relaxed, unless they, of their own will, let go of it. This is never implied in a grant of corporate power to a municipality, even when authority is given to the corporation, to cause streets to be established, and to exercise control over them. The power of regulation, repair and oversight of highways, is given only for corporate purposes, subject to the paramount authority of the State, in respect to their general and more

extended uses. If, therefore, the defendants in the case have no other right to occupy Broad street than that which the councils of the city have attempted to give to them, they have no right at all. It is a usurpation of authority on the part of councils, to take to themselves the powers which belong to the people, in the absence of authority delegated to them by the State through the Legislature.

To set up or establish a railway in a street, when there is no sufficient authority to sanction it, is to set up that which is *per se* a nuisance, because it is an invasion of the right of the public; it becomes a purpresture, making exclusive to one that which ought to be in common to every one. It obstructs and impedes the free use of a public road or street, interfering, as it does, with the freedom of transit along the highway, in the manner of its use, common to the people before the railway was established. An obstruction is anything *set in the way*, whether it totally closes the passage or only hinders and retards progress; and it is the duty of a municipal corporation, charged with the care of the streets within its bounds, to see that they are not unlawfully obstructed, either by themselves or by others. This duty makes it, the offence, the greater, if instead of protecting the rights of the public, and guarding the trust committed to their hands, they directly or indirectly cause or permit an obstruction in a highway, not authorized by the law of the land; and in this case there is not a pretence that such authorization exists.

What then is the Commonwealth's right to interpose by injunction in order to protect the right of the citizen to the enjoyment of a free passage on Broad street, from McKean to Snyder street? The distinction must not be overlooked, between the standing in equity of the individual suitor and that of the Commonwealth; to claim relief by injunction against the creation or maintenance of a public nuisance the first must show some special injury or inconvenience, to enable him to maintain a standing in court; but the right of the Commonwealth, through her legal representative, to interfere in this way, in order to protect the right of the public, cannot be successfully questioned; nor has it been in this case; regarding it, therefore, as the admitted right of the attorney-general to maintain in the name of the Commonwealth this suit, are we required to pause, as the defendant contends, and refuse the special injunction, until the question of injury and damage has been established by a trial at law?

The principle has long been settled, that where public rights or private rights, secured by statute or by contract, are invaded, and an injunction is asked for, in order to protect them, no question of the amount of damage is raised, but simply one of right. We acted on this principle in the case of the *City of Philadelphia vs. The Thirteenth and Fifteenth Streets Passenger Railway Company*, 8 Philada. Rep. 648. The authorities in support of this doctrine are there cited; to which may be added *Faust vs. The Passenger Railway Company*, 3 Philada. 164; *The Commonwealth vs. The Pittsburgh and Connellsville Railroad*, 12 Harris, 159. There can be no necessity for a trial at law to determine the character of an unauthorized encroachment on, or an illegal appropriation of a public highway; so that where railways or other corporations or individuals exceed their rightful powers in appropriating

other people's property, no question of damage is raised when an injunction is applied for, but simply one of an invasion of a right. Nor can the defendants depend on the principle of *de minimis*, as seemed to be supposed; the injury falling on no one in particular; the obstruction to travel being limited; and the use contemplated being temporary. It is a sufficient answer to this assertion to say, that no illegal appropriation of a highway can be defended on the principle of *de minimis*. It is not a small offence to interfere with the public rights of the citizens of the Commonwealth, and to obstruct their accustomed use of a public street. As to the intention to maintain the track in Broad street as a temporary expedient, this cannot be allowed as a defence of the wrong against which the attorney-general complains. Being of itself a nuisance, it has no right to exist for a single moment. If such encroachments upon public rights are tolerated upon this plea, under the authority of councils, it is the beginning of an evil, the end of which no man can foresee; these are wrongs which should be resisted and suppressed in their inception. If the track on Broad street is allowed to remain, and to be used by the defendants, who can tell when the use will cease? Snyder street may not be opened for years; it may never be opened; or it may be vacated as a street of the city. Nor is the argument that the preliminary injunction should not be granted, because it does appear that "irreparable damage" would be caused by refusing the injunction, a sound one. The term "irreparable damage" is used as expressing the rule that an injunction may issue to prevent wrongs of a repeated and a continuing character, or which occasion damages which are estimable only by conjecture, and not by any accurate standard: 12 Harris, 160, and authorities there cited. Lowrie, J., remarks, as this argument is generally presented, it seems to be supposed, that injunctions can apply only to very great injuries, and it would follow, that he who had not much property to be injured cannot have this protection, for the little he has. In that case an injunction was granted at the instance of the Commonwealth to prevent the filling up of a part of the State canal at Pittsburgh, although it appeared that it had scarcely ever been used, and had for many years lain in a state of abandonment. The question was decided upon a clear invasion of right, and not that of damage or irreparable injury. *The Attorney-General vs. The Cohoes Company*, 6 Paige, 133, is a case similar in principle as well as upon its facts.

We have not considered the question presented by the bill filed, on the special ground upon which the prayer for relief rests, except that of a general denial of the existence of any legislative authority to sanction the conduct of the defendants. The acts of March 23, 1866, and of the 31st of March, 1868, recited in the bill, showing the intention of the Legislature to free Broad street from all railroad obstruction, as evidenced in the declaration that no person, or corporation of any kind, should at any time thereafter, be authorized or empowered to locate, lay, construct or maintain, any railroad or railway tracks, or other obstructions, upon Broad street, or any part thereof, except at the intersection of streets, and for the purpose of crossing Broad street.

This legislative prohibition furnishes an additional reason in support of the prayer of the bill, and makes it more clearly our duty to enjoin at the suit of the Commonwealth against this plain violation of public

right by the defendants, and disregard of public duty by the councils of the city.

Injunction granted.

Lyman Gilbert, on behalf of the attorney-general, with whom were associated *George Biddle* and *George W. Biddle*, Esqs.

Moses A. Dropsie, Esq., for defendants.

[*Leg. Int.*, Vol. 32, p. 238.]

**J. M. POWER WALLACE, TRUSTEE FOR MARY FRY, PLAINTIFF, vs.
HENRY AUER, DEFENDANT.**

The business of a gold or silver beater, set up in a quiet dwelling neighborhood and by its noise and concussion unreasonably interfering with the quiet enjoyment, and perhaps safety, of neighboring property, is a nuisance which equity will restrain.

Motion for injunction. Opinion delivered *June 26, 1875*, by

ALLISON, P. J.—The bill recites that the plaintiff rented to the defendant premises No. 608 Wood street, for the term of one year from November 26, 1873, for purposes of a dwelling-house. That the defendant converted the back building of the house into a workshop, in which he carried on the business of a gold-beater, and manufacturer of silver leaf. That the adjoining residents complained, that by reason of the noise and concussion incident to said business, their homes were rendered uncomfortable, and the stability of their houses imperilled, and legal redress against plaintiff threatened, for which reason he notified the defendant to remove at the end of his term.

The defendant then removed into the adjoining house, 606 Wood street, where he carries on his business from early in the morning until late in the evening.

That the effect of this is to seriously impair the comfortable enjoyment of the premises of plaintiff, rendering it impossible to hear conversation, and by the concussion, to shake his house to its foundation, and keep it in a state of constant vibration while the work is in progress, whereby, as plaintiff asserts, the stability of the house is imperilled, and its destruction will be caused, unless the evil complained of is arrested.

It is charged that, by reason of the matter of which he complains, the house of the plaintiff has become uninhabitable, and its value as a dwelling utterly destroyed.

The prayer of the bill is, that the defendant be enjoined from carrying on his business on the premises which he now occupies.

The affidavits read in support of the motion for an injunction fully sustain the existence of the causes of complaint as stated in the bill, not only as to the serious disturbance of the comfort of the inhabitants of 608 Wood street, but to the safety of the building as well. A builder swears that the concussion, if continued, will probably cause the walls to crack, the foundations to settle, and the mortar to fall out.

The neighborhood in which this house is situate is devoted to private residences, almost exclusively, and has been so appropriated and used since the present structures were erected. The testimony of owners of neighboring property is, that the value of said property is greatly injured by the business of the defendant, which is carried on from seven in the morning to six in the evening, with only the intermission at noon. That

persons who have examined houses of the affiants refuse to rent them, on account of the noise and concussion which result from the pounding incident to defendant's business.

The defendant meets the case, as presented in the bill and accompanying affidavits, by a general denial, made by himself, as to the purpose for which he rented premises No. 608 Wood street, from the plaintiff, and the effect produced by his business upon the adjoining house. This is fortified by the affidavits of a builder, who says, that no injury can result from the concussion arising from the business of gold or silver beating; and also of a gold-beater and of a lumber merchant, who deny in a general way, the statements contained in the affidavits filed by plaintiff, but that which they assert is mostly a statement of opinion and belief, and of the condition in which they found the premises of defendant when they were there. These affidavits are not responsive to those of the plaintiff; nor do they attempt to meet the allegations of the owners and occupants of property on Vine street, who are most competent to testify on this subject, being constantly exposed to the annoyance of which they complain; nor are the facts sworn to, of the inability of owners of properties in the block to rent them, and the statements of persons seeking these houses as tenants, and their refusal to lease them, because of the noise and concussion caused by the defendant in the prosecution of his business, answered.

The jurisdiction of a court of equity to enjoin against carrying on business which injuriously affects the property or comfort of his neighbor, is now so firmly established that no one longer doubts it. The foundation of the jurisdiction is that sort of material injury to the property or to the comfort of those who dwell in the neighborhood, which requires on equitable principles the application of a power to prevent, as well as to remedy the evil: *Eden on Injunction*, 269. To restrain against nuisances is a fruitful subject of chancery jurisdiction: 2 Johns, Chan. R. 164; the term nuisance signifying anything which causes hurt, inconvenience or annoyance to the lands, tenements or hereditaments of another, or to the reasonable enjoyment of the same. In England, injunctions have been granted to restrain injuries resulting from brew-houses, glase-houses, lime-kilns, dye-houses, smelting-houses, chandlers' shops, and pig-stys, when set up in such parts of a town or city as that they inconvenienced the neighborhood: *Eden*, 264.

Our equity jurisdiction is not as extensive as that conferred on courts of equity in England, but under the act of 1836, the power is given to restrain the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals. The rights of individuals spoken of are the rights of property: Judge Strong's opinion, *Sparhawk vs. The Union Passenger Railway Company*, 4 P. F. Smith, 410; he further says, that owners of dwelling-houses have a right to protection against all unlawful noise and disturbance of domestic quiet; noise is an annoyance which may be complained of, and of which courts will take notice. The late Chief Justice Thompson granted an injunction against a tinsmith at the suit of a householder disturbed by the noise of his business. Everything that disturbs in an unreasonable degree the quiet enjoyment of a home or dwelling-house, is a nuisance. A man is to be protected in the enjoyment of his property against

all unlawful disturbances, if he does not, by such enjoyment, invade the rights of others: *Bonaparte vs. The C. & A. Railroad Company*, 1 Baldwin, 230.

We think the defendant, in the manner in which he is carrying on his business, is clearly within the principle which warrants the interposition by injunction. It is a case of substantial injury requiring speedy relief, because the injury of which plaintiff complains, interferes to an unreasonable degree, with the quiet enjoyment, to say nothing of the safety, of the houses of the residents of the neighborhood, including that of the plaintiff. The defendant has no right to complain if the injunction presses hard on him. He intruded his business into one of the most quiet neighborhoods in the city; a neighborhood rendered desirable as a home, in which quiet and rest could be found. This was wholly unnecessary on his part, many portions of the city being given up to business and its attendant noise and turmoil; other portions affording isolation, in which his business could be carried on, causing discomfort to no one. While business is to be fostered and protected against unreasonable objection, the home of the citizen, under the law, has an equal right to be defended against a wanton intrusion that destroys or unreasonably impairs its enjoyment.

Henry C. Titus and George W. Thorn, Esqs., for plaintiff.

Wm. A. Manderson and Alexander Thackara, Esqs., for defendant.

[Leg. Int., Vol. 32, p. 248.]

GOWEN vs. MCPHERSON.

A general allegation upon information in an affidavit of defence that another than the plaintiff owns the note in suit, is insufficient. The averment must be more specific as to the source and character of the information.

Rule for judgment for want of a sufficient affidavit of defence. Opinion delivered July 3, 1875, by

ALLISON, P. J.—This is an action against a second indorser on a promissory note, who swears to that which we think would be a good defence to this suit, if the note, as stated in the affidavit, is still the property of Alfred G. Miller, who is using the name of Gowen, as plaintiff asserts, to avoid the defence set up in the affidavit. This the defendant swears he has been informed and believes, and expects to be able to prove it true. We have recently held, in more than one instance, that this is not sufficient in a suit upon negotiable paper. That an affiant, who desires to prevent judgment upon copy filed, must be more specific in his statement as to the information, which he asserts in his affidavit, so that the court can judge whether this defence is *bona fide* or made in general terms, to prevent judgment.

Rule absolute.

Thomas Hart, Esq., for plaintiff.

W. W. Wiltbank, Esq., for defendant.

[Leg. Int., Vol. 32, p. 248.]

DE HART vs. MCGUIRE.

A treasurer's bond, given on his re-election in 1873 for the faithful accounting for funds coming into his hands for the term, will cover funds then remaining in his hands from prior terms.

Exceptions to auditor's report distributing fund arising from sale of defendant's property. Opinion delivered *July 3, 1875*, by

ALLISON, P. J.—The contest is between the Shamrock Building Association and the Francis Cooper Saving Fund and Building Association, on judgments entered against James A. McGuire, on official bonds, with whom is joined in the bonds Ann McGuire. The bonds were given to the associations by James A. McGuire, as treasurer. We are of the opinion that the terms of the instruments are broad enough to cover all moneys which were in the hands of defendant when he was re-elected treasurer in 1873. They are conditioned for a faithful accounting for and payment over, of all sums of money which have come into his hands, as treasurer for the term above mentioned. When the old bond was satisfied at the request of the defendant, he had moneys in his hands belonging to the associations, or ought to have had. When the term commenced in 1873, and the bonds now in question were given, whatever moneys had been received in prior years, not properly disbursed, he continued to hold by virtue of his re-election. In effect these moneys passed from the hands of James A. McGuire, as treasurer for 1872, and the years prior to that date, to James A. McGuire, as treasurer, under his election in 1873, and in this sense he received the moneys which were found due to each association by the auditor, under the bonds executed in 1873.

Exceptions dismissed and report confirmed.

J. D. O'Bryan and E. C. Quin, Esqs., for plaintiff.

C. W. Katz and G. W. Thorn, Esqs., for defendant.

[Leg. Int., Vol. 32, p. 248.]

WISTAR, TO USE, ETC., vs. CAMPBELL.

A surrender and acceptance of premises stops rent within the meaning of a recognizance on certiorari.

Rule for judgment for want of sufficient affidavit of defence. Opinion delivered *July 3, 1875*, by

ALLISON, P. J.—This is a suit on a recognizance on certiorari. The condition is to pay costs and rent that then had accrued, or might thereafter accrue, to the final determination of the cause. The affidavit of Olhs, the principal debtor, is, that on the 14th day of November, 1872, he removed from and gave up peaceable possession to plaintiff. Hiram Campbell, the surety, swears that Olhs, before the finding of the sheriff's jury, did deliver up quiet possession of said premises to plaintiff, *who accepted the same.*

This constitutes a clear assertion of an acceptance by plaintiff of the surrender of the term, which, if proved, would defeat his action.

Rule discharged.

A. M. Burton, Esq., for plaintiff.

Lewis Stover, Esq., for defendant.

[Leg. Int., Vol. 32, p. 256.]

BARTON *et al.* vs. MORRIS *et al.*

A farmer who sells the product of his own farm, and occasionally that of his neighbor, cannot be rated as a dealer in goods, commodities, within the meaning of the mercantile tax law.

In equity. Opinion delivered July 3, 1875, by

BIDDLE, J.—The complainants in this case allege that they are farmers residing in the adjacent counties of Chester, Delaware and Montgomery, and that they have stands in the various public markets of Philadelphia, where, twice a week, they sell the products of their own farms, and occasionally somewhat from that of a neighbor. That they have recently been rated by the appraisers of mercantile taxes, in the 14th class of “dealers in goods, wares, merchandise, commodities or effects of whatsoever kind or nature,” and are now required to pay the State tax appropriate to that class.

The act under which this claim is made was passed on the 4th of May, 1841, and does not appear ever before to have had the signification given to it which is now placed upon it by the appraisers. On the contrary, for thirty-four years, all those whose duty it was to enforce it, and the succeeding Legislatures, who must naturally have been aware of the construction put upon it, have acquiesced in considering it as having no application to those situated as complainants.

Most of the occupations of life trench on each other, and almost every one performs some function which belongs to a business other than his own. If, by a reference to these occasional and incidental acts, his pursuit is to be determined, he could be rated and taxed under very many heads. The law, however, regards his permanent and regular occupation, and fixes his liability by that, and not by some act which naturally grows out of it. He may, of course, have two distinct callings, and render himself liable to taxation under both. A physician who should open an apothecary shop could not, probably, claim exemption from a tax on druggists because of his profession. Yet if he occasionally compounded prescriptions for his patients, it would hardly be held sufficient to constitute him a vendor of drugs.

A dealer is one whose business it is to buy and sell. It is a term of trade having as distinct and well known a signification as that of merchant, mariner or broker. He is the middleman, who stands between the producer and consumer, his profit is not derived from selling the produce of his farm or his factory, but from his skill in knowing when to buy and how to sell the products of others. The Supreme Court has affirmed this to be the legal definition of the phrase. In *Norris vs. Commonwealth*, 3 Casey, 494, where an attempt was made to tax, as dealers, Norris Brothers, who made and sold locomotives, the court said, a dealer is not one who buys to keep, or makes to sell, but one who buys to sell again. So in *Commonwealth vs. Campbell*, 9 Casey, 380, which was the case of a tanner who sold his leather, the court reiterate their definition, and expressly overrule *Berks County vs. Bertolet*, 13 State Rep. 522, in which too wide a definition had been given to the meaning of the word “dealer;” the definition there being what the respondents contend for

here. In the administration of the internal revenue system of the United States an attempt was made to classify farmers selling their own produce as "produce brokers," but great as were the necessities of the government, the commissioner, on an appeal to him, said: "It cannot ordinarily be said to be the occupation of a farmer to sell his produce. It is his occupation to raise it. The selling is an incident to the production. It is only when he makes such selling his regular and constant business that he should be required to pay the tax;" Int. Rev. Record, vol. 11, 28.

In all enlightened legislation the effort is made to bring the producer and consumer together, and probably nothing has done more to give a character to our markets, and to promote the health of our people, than the efforts we have always made to that end.

By the common law, the buying or contracting for any merchandise or victual coming on the way to market, or dissuading persons from bringing their goods or provisions there, as making the market dearer to the fair trader, was called "forestalling," and rendered the perpetrators liable to fine and imprisonment. So, also, the offence of "re-grating" was described by the statute 5 and 6 Edward I., ch. 14, to be "the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the place." For this, it was held, enhances the price of the provisions, as every successive seller must have a successive profit.

The milder manners of our day affix a tax upon the dealer, and not upon the farmer, to obtain the same result which our ancestors endeavored to regulate by fine and imprisonment.

The fact that the farmer sometimes accommodates his neighbor by selling his produce, we do not think affects this question, even if he should receive a small commission for doing so. This may make him an agent, but as he does not buy, it cannot make him a dealer.

A decree in this case as prayed for will therefore be entered for the complainants.

Hon. William Darlington, Hon. Wayne McVeagh, C. H. Hunsicker, and Thomas H. Speakman, Esqs., for plaintiffs.

James W. M. Newlin, Esq., for defendants.

[Leg. Int., Vol. 32, p. 386.]

ASSOCIATION vs. GARDINER.

1. A writ may be made returnable in Philadelphia county to the first or the third Monday in September.
2. Judgment for want of an appearance can only be taken after fourteen days have expired after service.
3. In a *sci. fa. sur mortgage* no narr need be filed in order to take judgment for want of an appearance.

Sur rule to strike off judgment. Opinion delivered October 23, 1875, by

PEIRCE, J.—This was a *scire facias sur mortgage*, which exit September 3, 1875, returnable the first Monday of September, which was September 6, 1875. The writ was served on the 4th of September, and on the 17th of September the plaintiff took judgment for want of an appearance.

The defendant now moves to strike off the judgment on two grounds: First. That the writ was improperly issued returnable to the first Monday of September, instead of the third Monday of September, which was the quarterly return day, or first day of the next term after the issuing of the writ. Second. That no *narr* was filed before taking judgment, and that ten days after service of the writ and the usual days of grace had not expired when the judgment was taken.

By act of assembly, in the courts for the city and county of Philadelphia, all writs used for the commencement of actions may be made returnable on the first day of the next term, or the first Monday of any intermediate month, at the election of the party serving out the writ.

This gives two return days in September; the first and third Mondays respectively.

This disposes of the first objection.

The second objection is of a more serious character. The writ was served on the defendant on the 4th day of September, and judgment was signed against him on the 17th day of September.

By act of assembly he had ten days for his appearance after service of the writ on him; and by the well-established practice, the usual days of grace, making together fourteen days after the service of the writ before judgment could be signed against him for want of appearance: *Fisher vs. Potter*, 2 Miles, 147.

By the English practice, the third day the sheriff returned his writs into court, which were delivered to the *custos brevium*, and thence this day was called the day of *retorna brevium*, and then it was that the court was seized of the cause by possession of the writ. The fourth day was called the appearance day, or *dies amoris*, which was the day given *ex gratia curiæ*, for the defendant's appearance. And this, which is denominated the *quarto die post*, was the first day in which the court sat for the despatch of business: 1 Tidd's Practice, 107. These four days are called the days of grace.

Therefore, as this judgment was signed on the thirteenth day after the service of the writ on the defendant, and he had full fourteen days for his appearance, judgment was taken too soon, and must be set aside. There is nothing in the objection that a *narr* was not filed. The *seize facias* itself stood in the place of a *narr*.

Rule absolute.

J. Rich Grier, Esq., for rule.

C. W. Katz, Esq., contra.

[Leg. Int., Vol. 32, p. 386.]

LEJEE *et al.* vs. THE CONTINENTAL PASSENGER RAILWAY COMPANY OF PHILADELPHIA.

1. Corporate franchises cannot be declared forfeited, or lapsed to the Commonwealth, by bill in equity.
2. Under the act of June 19, 1871, Purd. 288, courts may give relief by injunction at the suit of private parties, or of corporations, when it is alleged that private or individual rights are injured or invaded, by any corporation claiming to have a franchise, to do the act from which the injury results.
3. Questioned.—Whether corporate franchises which have become vested by acceptance or otherwise, can be taken away or declared forfeited to the Commonwealth, by an alteration or amendment of the Constitution of the State. And whether such grant is not protected by Article 1, section 10, of the Constitution of the United States.

Opinion delivered October 20, 1875, by

ALLISON, P. J.—We are asked by the plaintiffs to restrain the construction of a passenger railway by the defendant corporation, upon the route designated in their charter and set forth in the bill; particularly on and along Eighteenth street.

The act of incorporation was approved the 8th day of September, 1873.

The minutes of the commissioners assert that four of those named in the act joined in a call for a meeting of the corporators to be held November 8, 1873, for organization and the opening of books of subscription to the capital stock, in accordance with the provisions of the act; that upon that day a meeting was held, a president and secretary elected, the charter accepted, the books of subscription opened, and 12,000 shares of stock subscribed. Tellers were appointed to receive upon each share so subscribed the sum of \$5, but the minutes, though evidently framed to convey the impression that the full amount of \$5 on each share was paid at that time, does not assert that such payment, amounting to \$60,000, was then made. The minutes set out the tellers' report, that \$5 was paid to 12,000 shares subscribed.

At this meeting it was resolved that the secretary prepare an application to the governor for letters patent, and ordered the moneys received to be paid to the treasurer of the meeting; the minutes do not disclose the name of the treasurer, or that any treasurer had been elected.

It further appears that application for letters patent was made to the governor, the commissioners having certified to him the subscriptions, and that \$5 on each share was paid, upon which the letters patent were granted December 30, 1873.

December 20, 1873, a board of directors was chosen, who elected, on the same day, a president and a secretary, and directed that a survey of the route of the road should be prepared, and that an application should be made to councils to lay the tracks in accordance with the charter. December 31 following, the survey of the route was filed with the board of surveyors, but the consent of councils was not obtained until June 14, 1875.

This statement seems to be necessary to a correct understanding of the material point made by the plaintiffs in support of the prayer of the bill, which is, that by article 16, section 1, of the constitution of this State, it is provided, that "all existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of the constitution, shall thereafter have no validity." In the 9th paragraph of their bill the plaintiffs say they are informed and believe, and so aver that no *bona fide* organization of said Continental Passenger Railway Company of Philadelphia had taken place and business been commenced in good faith under their charter before the adoption and taking effect of the said constitution, and that the said charter, by reason thereof, is void and of no validity, and that it was without validity and inoperative when the consent, as aforesaid, of the councils of Philadelphia was obtained.

This, which is the vital part of the plaintiffs' bill, raises squarely the question of charter or no charter, whether the letters patent granted by the governor under the broad seal of the Commonwealth are to be treated

as so much waste paper, or whether we are to regard these letters as valid and operative, conferring upon the defendant all the rights, powers and immunities of a body corporate, with authority to construct the railway mentioned in the act of incorporation. It is true, the proceedings are not in form, such as would enable the court to enter a judgment of ouster against the defendant, nor do the plaintiffs, in form, pray for such judgment. They ask the exercise of the restraining power of the court merely, yet it is upon the sole ground that the charter, if it ever was valid, is valid no longer; that the defendants have ceased to be a corporation, and ought therefore to be restrained from exercising the powers and enjoying the franchises which the act of September 8, 1873, conferred upon them.

We do not think we can do by indirection that which we are asked in substance to do; we must look rather at the consequences of a decree such as we are asked to make in this case, and if the effect of it is to declare that the defendants do not possess and cannot exercise the corporate functions conferred by the act which gave them being; to say that whatever of corporate life they once possessed died the moment the new constitution was adopted, we must pause, and if we stand upon no more than an earnest, substantial doubt as to the right, or even as to the expediency of granting the prayer of the bill, it must, upon such doubt, be refused.

The clause of the constitution invoked by plaintiffs in support of their bill treats only of *existing charters*, or grants of special or exclusive privileges; what was intended by the clause—grants of special or exclusive privileges—as distinguished from a grant of a charter conferring corporate privileges, it is not necessary to determine. The case before us relates to chartered rights, granted in terms not doubtful; perfected by letters patent, attested by the approving signature of the governor, and secured under the seal of the Commonwealth.

As the plaintiffs have stated their case, it rests upon the admission "that the defendant is a corporation chartered by an act of assembly of the Commonwealth of Pennsylvania," yet they ask us to say, in the face of this admission, that it is a corporation having a name to live while it is dead, and though clothed in the corporate robes with which the State invested it at its birth, it is fit only to be cast out and trodden under foot. All this may in truth be so, for we are not unmindful of the serious impeachment which the plaintiffs have brought against it, supported by the oaths of respectable citizens, who aver on information and belief, that every material statement spread upon the minutes is false. That there was no meeting of the commissioners named in the charter to open books and receive subscriptions of stock. That there were no subscriptions to the stock, nor was any allotted at the time of the issuing of the charter. That there was no division of stock or shares issued or money paid December 20, 1873, at the time of the alleged election of a president and directors, and that there was no organization nor stock subscribed nor money paid January 5, 1874, when the plan of the road was approved by the board of surveys, nor even when the consent of the city was given, January 14, 1875, and that the stock was not subscribed nor distributed, nor money paid, until during the months of July and August of the present year.

But even if all this is true, the proper remedy has not been invoked. These allegations can all be tested by *quo warranto*, and if they are true, or if there is reasonable ground to believe them to be true, the aid of the proper authorities ought to be promptly invoked, in order to test the question, whether a fraud so gross has been perpetrated to the prejudice of the right and interests of the Commonwealth. Against this conclusion, the plaintiffs argue that the distinction between proceedings by bill and *quo warranto* is a wide one; that they do not, in this proceeding, contemplate logically a forfeiture. This may be granted, but the fact remains that their case rests upon a proposed finding by the court that all franchises of the defendant have long since been forfeited to the Commonwealth. It is not a question of the construction of a charter, or whether the defendant is exceeding powers granted; whether the corporation is attempting to do more than they may of right do under a grant of corporate authority; but we are asked to say that there is no longer such a corporation in existence as the Continental Passenger Railway Company of Philadelphia, because the defendant, on the 16th day of December, 1873, when the constitution was adopted, had not a *bona fide* organization, and had not, at that time, in good faith, commenced business. What other result could be reached by a successful trial of the same issues upon *quo warranto*, upon an allegation of fraud, practised by a pretended organization, involving the questions of subscriptions to stock, payment of money thereon, election of officers, and a false certification to the governor of the payment of \$5 on each of the 12,000 shares subscribed? If, therefore, the decree which we are asked to make, will have the same result, and must be based upon a judicial finding by the court of the same fact, which, upon satisfactory proof, upon a trial upon *quo warranto*, could be found by a jury where the question was one of forfeiture, and the judgment ouster, we hold that we are not competent to make such a decree in a proceeding by bill in equity. It would be confounding distinctions and modes of procedure, which are so firmly settled in the law that all attempts to set them aside, or to substitute the one for the other, except when authorized by proper legislation, must fail. In the case of the *Turnpike Company vs. McConaby*, 16 F. & R. 145, the court say of that case, "but if this charter had been fraudulently obtained, . . . still, until that question has been directly decided, in a proceeding instituted in this court, . . . either by *scire facias*, to repeal the charter, or declare it forfeited, or by a writ of *quo warranto*, at the suit of the State, in which the State must be a party and a party to the judgment, for the seizure of the franchises, there is no instance of calling in question the right of a corporation for the purpose of declaring its charter void, but at the instance and on behalf of the government, and never at the relation of an individual."

The plaintiffs, however, contend that the common law and statutory remedy by *quo warranto*, reaching to an inquiry into a loss or forfeiture of corporate franchises is authorized by the act of June 19, 1871 (Purdon, 288), in all proceedings in courts of law and equity in this Commonwealth, and when such courts are exercising equitable powers, they may give relief by injunction, at the suit of private parties or other corporations.

The act provides, that when it is alleged that the private rights of individuals, or the rights or franchises of other corporations, are injured or invaded by any corporation, claiming to have a right or franchise to do the act from which such injury results, it shall be the duty of the court to ascertain whether the corporation does in fact possess the right or franchise from which the alleged injury results, *and if such rights or franchises have not been conferred upon such corporations*, then to afford relief, as provided in the act. The inquiry which the court is here required to institute is, whether a right or franchise claimed by the corporation charged with a usurpation of power has been conferred upon, or granted to such corporation; whether, by virtue of such grant, it can lawfully do the act which it is alleged inflicts injury upon the private rights of individuals, or upon the franchises of other corporations? If the charter establishes the fact that the right is with the corporation complained against, because it is conferred upon it as a corporate franchise, there can be no injunction; if, upon the other hand, an examination of the charter shows that the power claimed has not been conferred, then the injurious act, which is thus shown to be an act of usurpation, and without charter right to sustain it, may be enjoined. There is, however, nothing in this which is new to equity jurisdiction and practice, but it settles a question upon which there had been a difference of opinion, and perhaps much conflict of decision, namely, that private parties may come into equity when they complain that private rights, which belong to them as individuals, have been encroached upon by an offending corporation. This very objection is taken by the defendant in this suit, contrary to the clear decision of Judge Strong, in *Faust vs. The Railway*, 3 Phila. R. 164, and the case of *The City vs. The Thirteenth and Fifteenth Streets Railway*, and authorities there cited, 8 Phila. R. 648. The act of June 19, 1871, takes this question out of the region of doubt or speculation, and places the right of the private suitor to maintain a proceeding in equity against a usurping corporation beyond cavil or dispute.

The interpretation which we place on the act of 1871, it will be seen, is radically different from that given to it by the plaintiffs. We hold that it is a search for an alleged grant of corporate franchise; they claim that the act requires the court to go farther, and though satisfied that the franchise was, beyond all doubt, vested in the defendant by their charter, that we ought to enter upon an investigation of an asserted forfeiture, in order to ascertain whether, for the reasons assigned in the bill, these powers have been taken from or lost to the defendant. In other words, whether the grant of corporate power has reverted to the Commonwealth, by reason of the neglect or fault of the defendant. We understand this law to have a different purpose and meaning, and therefore decline, in this proceeding, to pass upon the question of forfeiture, or practically to enter a judgment of ouster against the defendant, even though we should, upon all points, agree with the plaintiffs. We stand upon the opinion in 16 S. & R. 145, when it affirms there is no instance of calling in question the right of a corporation, for the purpose of declaring its charter void, but at the instance and on behalf of the government.

Nor does the act of June 16, 1836, Purdon, 1206, enlarge the power of the court, as to forfeited corporate franchises, even upon inquiry by

quo warranto, where it says, the writ may issue at the suggestion of any person desiring to prosecute the same. The remedy at the suggestion of an individual is confined to cases which are in the nature of private injuries: 7 Penna. State R. 34; 29 Id. 129; 20 Id. 185 and 415; 2 Grant, 392. If this, therefore, was in fact a proceeding by *quo warranto*, we could not afford the relief which is sought by plaintiffs.

An important consideration lies back of all that we have thus far said upon the question in hand. It was suggested by my brother Peirce, who sat with me in the argument of this cause, whether the Constitution of the United States did not protect those who possessed grants of corporate power from being deprived of them under the section of the constitution of the State which has been invoked by plaintiffs. The more I have reflected upon this suggestion, the more important does it seem to be in its bearing upon the plaintiffs' prayer for relief, in connection with the special reason upon which they base their prayer. The Constitution of the United States is for all the States of the Union, the supreme and paramount law.

The statement of Justice Sharswood, delivering the opinion of the court in the case of *The Commonwealth vs. The P. & C. Railroad*, 8 P. F. S. 43, will not be controverted. He says: "The Federal Constitution is the constitution of this State, having been ratified and adopted by the sovereign act of the people in convention December 12, 1787. They made it irrevocably their own by entering into a solemn compact with the people of their sister States binding them for all time, unalterable in any other mode than that pointed out by its own terms." This principle was stated by Chief Justice McKean thus: "The government of the United States forms part of the government of each State." *Respublica vs. Cobbett*, 3 Dallas, 473.

The clause of Article I, section 10, of the Constitution of the United States, which declares that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts, is a limitation on the power of every State, which cannot, in any instance or any manner, be successfully transgressed. It matters not whether the law of the State which sins against this provision of the supreme law of all the land is passed by the Legislature in ordinary form and approved by the governor, or whether it is passed by a vote of the citizens of the State, when in the exercise of their sovereign power, they make for their own government a constitution to which all other laws of the State must conform. The constitution of each State is the fundamental law of the State; it is a law passed by the State; and is therefore covered by or included within the 10th section of Article 1 of the Constitution of the United States. In the case of *The Commonwealth ex rel. vs. Collins*, 8 Watts, 349, Judge Huston says: "Let us not mistake things or words; a constitution is but a law; it emanates from the people; the depository, and the only one, of all political power; it is therefore the supreme law. . . . Still a constitution is but a law, though it is the supreme law, it is to be construed as every other law, though it is sometimes termed the law by which acts of the Legislature, which are generally termed laws, are to be tested."

The obligation of a contract is therefore protected by the Constitution of the United States against a law of the State, in either form, which impairs or seeks to impair such obligation. The *Dartmouth College Case*

vs. *Woodward*, 4 Wheaton, 625, settled the doctrine that a private charter is a contract protected by the Constitution of the United States, because such a grant by a State confers rights of property; rights which possess a value that may be asserted in a court of justice. This case has been followed in numerous decisions of the same tribunal, and is recognized as unquestioned law over all the land. In our own State, this recognition appears in the *Bank vs. Pittsburgh*, 1 Wright, 346, the court say legislative charters like legislative grants of land, are contracts within the meaning of the Federal Constitution. *Brown vs. Hummel*, 6 Barr, 86, and *The Commonwealth vs. Cullen*, 1 Harris, 139, assert the inviolability of such contracts, or grants of corporate privileges, which are protected from all material subsequent legislative alteration, without the consent of the corporators.

If this may not be done by a Legislature, can it be done by a law passed in the form of a constitution? We incline strongly to the opinion that it cannot. We are not forgetful that this charter, if accepted at all, was accepted subject to the power reserved to the Legislature by 25th section of Article I of the Constitution of Pennsylvania of 1838, to alter, revoke, or annul it, whenever in their opinion it became injurious to the citizens of the Commonwealth. The difficulties which stand in the way of a justification for annulling this charter under this reservation in the constitution are: First, the Legislature is constituted the special tribunal to exercise this power, and that it is not, in terms, at least, reserved to the people acting in their sovereign capacity. The second is, that it can only be accomplished so that no injustice shall be done to the corporators. If this charter had been accepted by the corporators before the adoption of the present constitution, their rights had become vested, its franchises were already their property, which could no more, it seems to us, be taken from them, than if it had been a grant of land by the Commonwealth, which they had accepted. To deprive citizens of corporate franchises, which had vested in them, without even contemplating compensation, certainly not in fact tendering compensation, or providing the means of obtaining it, is not obeying the constitutional command, to see that no injustice is done to the corporators in the annulling of a charter.

This is, of course, all based on the assumption that the defendants had accepted their charter and complied with all the obligations imposed by the general railroad law, to which, with one exception, they, as a corporation, were made subject.

This is one of the material facts in dispute, which we think can only be determined by a trial upon *quo warranto*, and such cannot be settled by a bill in equity.

These considerations warn us to move cautiously, and have created doubts, to call them by no other name, which require that the special injunction prayed for should be refused.

George W. Biddle, *George W. Thorn*, and *William H. Ruddiman*, Esqs., for plaintiffs.

F. Carroll Brewster and *David W. Sellers*, Esqs., for defendants.

[Leg. Int., Vol. 32, p. 420.]

RUTHERFORD vs. BARQUE "ORNEN."

A State court has no authority by a proceeding *in rem* to enforce a maritime contract.

Pilotage is a maritime contract.

Rule to dissolve attachment. Opinion delivered November 20, 1875, by

BIDDLE, J.—A libel was filed in this case against the barque "Ornen," to secure the payment of pilotage from the breakwater up the river Delaware to the port of Philadelphia, and under it the vessel was attached. This was done in accordance with the 6th section of our State law of March 25, 1861.

The regularity of the proceeding is not questioned, but it is contended that the section violates the provisions of the Constitution of the United States, and is therefore void.

The constitution ordains that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the 9th section of the Judiciary Act of 1789 provides that the District Courts of the United States "shall have exclusive original cognizance of all cases of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common law remedy, when the common law is competent to give it." That the common law remedy can be pursued, is not questioned. But it is contended that common law remedies are not adapted to enforce a maritime lien by a proceeding *in rem*, and consequently, the original jurisdiction to enforce such a lien, by that mode of proceeding, is exclusively in the District Court of the United States. This appears to have been decided by the Supreme Court of the United States, in *The Moses Taylor*, 4 Wallace, 411, and in the case of *The Belfast*, 7 Wallace, 644. In the latter case the court say, "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practised in the Admiralty Court." This leaves it optional to a suitor in such a case to proceed *in rem* or *in personam* in the Admiralty Court, or to resort to his common law remedy in the State court or in the Circuit Court of the United States, if the parties are such as to give that court jurisdiction. In other words, a suitor can treat a maritime contract like any other contract, or he can, by going into the admiralty, avail himself of the peculiar system there administered in contracts of that character.

The vessel, in either case, may be "attached," but in the admiralty the vessel itself is treated as the offending party, the *res*, while in the common law court it is simply the interest of the defendant in it which is made responsible for his debts. The title of a purchaser is therefore very different under the two proceedings.

Our court clearly having no jurisdiction if the case here presented is within the admiralty and maritime jurisdiction of the District Court of the United States, the question arises, is it within such jurisdiction? Is the contract of pilotage a maritime one? This can hardly be doubted.

Although the regulation of the subject of pilotage by the several

States was, in the absence of legislation on the part of Congress superseding it, held constitutional by the Supreme Court of the United States, in *Cooley vs. The Board of Wardens*, 12 Howard, 312, yet the contract itself has never been treated by it as other than a maritime one. In 1862 the Legislature of Massachusetts passed an act providing that "the hull and appurtenances of every vessel shall be liable for all legal claims on account of pilotage, either rendered or offered for the space of sixty days:" chapter 176, clause 10. Judge Lowell, of the United States District Court, held, that the lien given by this act could be enforced in the admiralty: *The Brig America*, 2 Am. Law Rep. 458. In *Ex parte McNiel*, 13 Wallace, p. 243, the court say, "that contracts relating to pilotage are within the sphere of the admiralty jurisdiction has not been controverted by the petitioner. The question is not an open one in this court." This simply follows the older decision of *Hobart vs. Drogan*, 10 Peters, 119, to the same effect.

Whether a lien exists under the general maritime law, or is created entirely by State legislation, the contract being maritime, it can be enforced *in rem* in the District Court of the United States alone. This principle is established in the late case of the *Lottawana*, 21 Wallace, 580.

We think then the exception in this case well taken; it is an effort to enforce a maritime contract, under a lien given by the State, by a proceeding *in rem* in a State court, which we understand the Supreme Court of the United States to have decided to be unconstitutional.

The attachment is therefore dissolved.

A. J. D. Dixon and Morton P. Henry, Esqs., for rule.

Alex. P. Colesberry, Esq., contra.

[Leg. Int., Vol. 32, p. 420.]

HALL & GARRISON vs. THE FILTER MANUFACTURING COMPANY *et al.*

Horses and carriages kept at a livery stable are not subject to attachment execution against the livery stable keeper. They may be levied on directly.

Rule for judgment on answers of garnishee. Opinion delivered November 20, 1875, by

BIDDLE, J.—The garnishee is a livery stable keeper, and admits that he has in his stable two horses, two sets of harness, and two carriages, which are kept there by defendant.

In the case of *Buckner vs. Croissant*, 3 Philada. Rep. 219, the Court of Common Pleas held that a livery stable keeper has no property as pawnee in a horse at livery, which makes it liable to attachment. In *Good vs. Abertauffer*, 1 T. & H. 756, the goods were deposited by the defendant in the garnishee's store. The District Court say: "They may be liable to a charge for storage, though the garnishee does not set that up. Admitting the lien to exist, they are, notwithstanding, 'not goods pawned or pledged by him as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term,' it can only mean an actual pawn or pledge for any debt or liability by defendant, not merely a lien arising by implication of law."

In this construction we concur. There is nothing, apparently, to

prevent, in this case, an actual levy upon the property as belonging to defendant. The object of this process is to reach effects which cannot be levied on under a *fi. fa.*, and not those which are liable to that form of execution. This rule is discharged.

J. C. Grady, Esq., for the rule.

F. Osbourne, Esq., contra.

[*Leg. Int.*, Vol. 32, p. 464.]

McILVAIN vs. THE SOUTHWESTERN MARKET COMPANY.

In equity pleading the averments of the original bill and of the answer to a cross-bill are to be taken together in determining the sufficiency of the answer to the cross-bill. The bill and cross-bill and their respective answers are to be treated as part of one case.

Opinion delivered *December 24, 1875*, by

ALLISON, P. J.—We have in this case a bill and cross-bill, touching an alleged purchase of forty shares of stock by plaintiff, issued by the company, defendant.

To the sufficiency of the answers of McIlvain to the allegations of the cross-bill, exception is taken.

In the bill filed by McIlvain, he sets out the purchase of said stock from one Hartman Grau, the consideration paid to Grau, and his appointment by plaintiff as his attorney to sell and transfer the shares recited in the power.

The cross-bill admits the issue of the stock to Grau, but asserts that it was issued to pay claims to mechanics and material men; his failure to apply the stock as directed; resolutions passed December 20, 1860, and February 18, 1871, forbidding transfer of the stock; that it was not sold to McIlvain, but was deposited with him by Grau as collateral security for a loan; and that before that time, and at the time of the loan, McIlvain was fully notified of the purpose for which the stock was issued, the want of consideration, and of the resolutions of the directors of the company. The company, defendant, further allege the payment to McIlvain of the consideration for which it was deposited with him as collateral security. To these allegations McIlvain makes answer, denying knowledge on his part that the stock was issued for the "sole and specific purpose" of paying existing liens, and asserts, on information, that the stock was issued absolutely for a good and valid consideration.

He denies all knowledge of the resolutions passed by the board of directors until long after he had purchased the stock.

Taking the several statements contained in the bill and cross-bill, we think that everything is stated with sufficient directness to present the issue upon which the questions are to be determined.

The averment of purchase by McIlvain, for a valuable consideration, which is specific as to amount and kind, is a denial in effect of the allegation that he took the stock as collateral security, and that the advance upon it has been since repaid to him. Consideration passing from Grau to the market company is stated upon information, which is all that a third party can be reasonably required to make. The most material matters of defence to the prayer of the bill filed by McIlvain, as set forth in the cross-bill, are denied by him in his denial of the fourth, fifth, sixth and eighth paragraphs of the cross-bill.

A cross-bill is treated as a mere auxiliary suit, or as a dependency of the original suit. The respective averments and denials are, therefore, to be treated as part of the one case, and upon this principle it has been held that the plaintiff in a cross-bill cannot contradict the assertions in his answer to the original suit: *Hudson vs. Hudson*, 3 Rand. 117, and where the allegations of the cross-bill are inconsistent with the admissions of the answer, they cannot be taken as true, though unanswered: *Savage vs. Carter*, 7 Dana, 414.

The case before us is a good illustration of the value, and in some instances of the necessity, in order to do full justice between parties, of having all the equities alleged to exist between them presented for determination in the one suit. A defendant cannot pray anything in his answer, except to be dismissed the court; if he has any relief to pray or discovery to seek he must do so by bill of his own; Lube Eq. Pl. 55. This he can only do by cross-bill. If this were not the case, he would have to follow the original bill to a final determination before he could ask for the relief to which he believed himself to be entitled, or perhaps file his own bill as plaintiff, which would result in two separate and independent suits for the same cause of action in progress at the same time, which would be vexatious, and cause an increase of litigation by a multiplicity of suits.

The bill prays that the company, defendant, be compelled to issue a new certificate for the forty shares of stock now held by him. The cross-bill denies that he is a *bona fide* holder of the stock, and is without right to the same, and asks that he be decreed to deliver up the stock for cancellation.

When this case comes up for final hearing on both bills, the answers and the proofs, the entire merits of the controversy will be fairly presented for a just decision of the cause, and as we think the contradictory assertions which are distinctly made, are fully denied in one form of pleading or the other, the exceptions should be dismissed, and it is so ordered.

Edward S. Dixon, Esq., for McIlvain.

Henry C. Titus and George Junkin, Esqs., for the market company.

Court of Common Pleas, Philadelphia.

No. 2.

[Leg. Int., Vol. 32, p. 264.]

SHERIDAN SHOOK AND ALBERT PALMER vs. JOSEPH H. WOOD.

A defendant will be restrained by injunction from using the title of a dramatic composition which has been copyrighted, even though the body of the play intended to be presented under that title may be different from the copyrighted play.

Opinion delivered July 17, 1875, by

PRATT, J.—The plaintiffs in this action claim to be the sole owners of a certain dramatic composition or play, entitled, *Les Deux Orphelines*, or *The Two Orphans*, and that the defendant, Joseph H. Wood, being the manager and proprietor of a certain theatre in the city of Philadelphia, known as Wood's Museum, has announced, declared, and published his intention of performing and presenting said play, without any license or consent of plaintiffs, and greatly to their damage and loss. The case was heard upon bill and answer, and was fully and ably argued by counsel on both sides. There was an attempt upon the part of defendant's counsel, in his argument, to dispute plaintiffs' title, although in the answer of defendant he did not deny its validity, nor did he deny the allegations of the plaintiffs, that it was his (defendant's) purpose to represent a play entitled, *Les Deux Orphelines*, or *The Two Orphans*.

Defendant stated in his answer, that under his announcement to present *The Two Orphans* at his theatre, it was his purpose to introduce a play translated from the French, entitled *Les Orphelines De La Charité*, a play written and produced in the city of Paris in 1857. Defendant attached a copy of the play in the French language, which he desired might be considered as a part of his answer, saying that his translation had been lost.

It is, perhaps, unnecessary to discuss the validity of plaintiffs' title to the play entitled *Les Deux Orphelines*, or *The Two Orphans*, as it has already been twice affirmed by courts of competent jurisdiction, the last time being in June, 1874, in the Superior Court of the city of New York, before the Hon. G. M. Spier, justice; even without these adjudications there was, in our opinion, sufficient shown in the affidavits and papers submitted, to assure to plaintiffs a full and complete title to the said play of *Les Deux Orphelines*, or *The Two Orphans*.

The play in question was the joint and original production of Adolph D'Ennery and Eugene Cormon, citizens and residents of the republic of France, and N. Hart Jackson, a citizen and resident of the United States of America.

Under an agreement between these last mentioned parties, this play was presented by D'Ennery and Cormon at two theatres in the city of Paris, to wit, at the Theatre Chatalet and Theatre Porte St. Martin, under the title and designation of *Les Deux Orphelines*, and was thereafter, in accordance with the mutual stipulations and agreements of the parties, presented as a dramatic composition or play at the Union Square

Theatre, in the city of New York, and subsequently in Philadelphia, under the title of *The Two Orphans*, being the literal and absolute translation of the title of said play from the French into the English language.

Previous to any of these last mentioned representations of said play in the United States, the said N. Hart Jackson secured, on the first day of February, A. D. 1875, a copyright in his own name, to the said play, under the title of *The Two Orphans*, in accordance with the provisions of the act of Congress in that behalf made.

It appears that this play had never, by consent of either of the authors, been given or made in form of publication, nor in any manner presented to the public except as a dramatic composition.

After the granting of the copyright to the said N. Hart Jackson, with the consent of the said Adolph D'Ennery and Eugene Cormon, theretofore had and made, the said Jackson did assign and transfer all his right, title and interest in the said play, and the copyright thereof, to the plaintiffs, and this assignment was duly recorded in the office of the Librarian of Congress, at Washington.

The act of Congress of 1856 was intended to secure to the authors and proprietors of dramatic compositions the same privileges and protections as were given to literary authors by the act of 1831. It provides that a copyright should be deemed and taken to confer upon the author or proprietor, his heirs and assigns, along with the sole right to print and publish a composition, the sole right also to perform or represent the same, or cause it to be acted, performed or represented, upon any stage or public place, during the whole period for which the copyright is obtained.

It appeared that the plaintiffs have expended large sums of money in bringing the play before the public, and their representations have been attended everywhere with the greatest success.

The name of *The Two Orphans*, as characterizing a particular dramatic representation, has great value to plaintiffs. It is the name by which their play is known to the general public, and when defendant announced the performance of *Les Deux Orphelines*, or *The Two Orphans*, under both the French and English titles, if it was not his intention to produce that play, the effect of it was to mislead the public, and thereby injure the plaintiffs in their future business.

The defendant's counsel contended that plaintiffs had no protection in this title to their play, and the substance of his argument was to the effect that, as no portion of the play was to be performed, defendant could use plaintiffs' title to introduce any play he should choose to present.

In this instance it appeared clearly to the court, from the announcement upon the bills, and from the advertisements of defendant, that his intention was at least to lead the public to believe that the genuine play of *Les Deux Orphelines*, or *The Two Orphans*, of which plaintiffs are owners, was to be performed at his theatre.

From such a use of this name the court is of the opinion that the defendant should be restrained.

It is therefore ordered, That the said injunction be, and the same is hereby, in all things, continued in force and made permanent, and the

defendant, and all other persons mentioned and referred to in said injunctive order, are hereby, in all things, restrained and enjoined and forbidden, as in and by said injunctive order they were and are enjoined and restrained and forbidden. Security in \$500.

Charles W. Brooke and James H. Heverin, Esqs., for plaintiffs.
Lucas Hirst, Esq., for defendant.

[Leg. Int., Vol. 32, p. 82.]

COLKET et al. vs. ELLIS et al.

The act of April 22, 1874, for the submission of cases to the court without a jury, discussed.

While no statute or principle of public policy intervenes, but a rule of law is a mere privilege which may be waived, such waiver may be as well by a custom known to and acquiesced in by the parties, as by an express contract.

A custom among brokers to sell stocks deposited as collateral security for a call loan, at the board, on failure of the borrower to pay on the day on which demand is made, is not illegal as to parties familiar with and dealing on the basis of such custom.

An account rendered becomes an account stated if not objected to in a reasonable time. Four months held to be in this case, such an unreasonable time as to amount to an estoppel.

Opinion delivered *March 1, 1875*, by

MITCHELL, J.—This case having been called in its regular order upon the trial list, the parties, by their respective counsel, filed at bar an agreement to dispense with trial by jury, and submit the decision of the case to the court, in accordance with section 27, Article V. of the new Constitution and the act of assembly of April 22, 1874, (P. L. 109.) This being, so far as I am aware, the first case in this county in which these new provisions have been acted upon, I deem it proper to indicate my serious doubt, whether the requirements of the act of 1874 are not in excess of the constitutional provision, and whether, therefore, they are binding upon the courts.

Section 27 of Article V. of the Constitution, after providing for the submission of the case to the court, continues: "And such court shall hear and determine the same, and the judgment thereon shall be subject to writ of error *as in other cases.*"

The act of 1874, section 1, apparently without warrant, excludes from the privilege of this section parties "acting in a fiduciary capacity." Section 2 then proceeds to dictate that "the decision of the court shall be in writing, stating separately and distinctly the facts found," etc., and in conjunction with the next section appears to provide for a review by the Supreme Court of the findings of fact upon an appeal in a manner unknown to trials by a jury.

It may be that the act can be read so as to provide for a writ of error in cases where that is the proper mode of review, and for an appeal in those cases only, where an appeal would lie by existing laws. This mode of construction would harmonize the proceedings by this mode of trial, and by the ordinary mode of trial by jury; but the question would still remain whether the Constitution did not intend to submit the decision of the facts to the court in the same manner as they are ordinarily submitted to a jury, and whether the right of the court, under the Constitution, to make a general finding for the plaintiff or the defendant, in

substitution for a general verdict, can be taken away by a legislative provision, that the finding shall in all cases state the facts separately and distinctly.

There are many cases in which this duty would be burdensome and most vexatious, and the reasons are many and weighty why it should not be put compulsorily on the court in all cases.

It is not my intention, however, at present, to do more than indicate my doubt upon this subject, and to expressly exclude any inference of acquiescence in the binding force of all the requirements of the act of 1874. In the case before me, I think the final determination can be most satisfactorily reached by a special finding of the facts, which I therefore proceed now to make. Fortunately, the candor with which both parties testified to their transactions, removes all serious difficulty from this task.

FACTS FOUND.

I. I find the following facts from the evidence given in the cause:

On September 17, 1873, the plaintiffs, Colket & Tevis, borrowed of defendants, R. Ellis & Co., \$16,000, on call, and deposited as collateral security therefor 500 shares of the stock of the Lehigh Coal and Navigation Company. A loan on call is understood to be one in which payment may be demanded on any day by notice before 10½ o'clock A. M. In addition to this understanding from the general nature of the loan, there was, in this case, an express agreement that this loan should be repaid on the following day, September 18.

On September 18, defendants called the loan in the regular way, according to the custom. On this morning the failure of Jay Cooke & Co. was announced; a panic ensued in the stock market, and plaintiffs were unable to pay the loan. Several interviews took place between Tevis, one of plaintiffs, and Ellis, one of defendants, the last of which, about 2½ o'clock, resulted in the pledge by plaintiffs of an additional 100 shares of Lehigh stock as collateral, and an agreement by defendants to carry the loan till the next day.

It was the distinct understanding of both parties that the carrying of the loan for this single day was a matter of great difficulty in the condition of the market, and that the loan must be paid the next morning, or the stock must be sold.

September 19. Frequent interviews took place between Tevis and Ellis relative to the payment of the loan: the final one, about 2 o'clock, took place at the head of the stairs in the exchange, outside the room of the board of brokers. Tevis finally informed Ellis that he was not able to pay the loan, and he (Ellis) "must protect himself." Ellis said, then he must sell the stock; that he had a customer in his office for three hundred shares at twenty. Tevis assented to that sale, and Ellis then said, "I have sold three hundred at twenty on your account, and I'll go into the board and sell the rest;" and went into the board-room. Tevis, in his testimony, says, "I made no objection whatever to this remark." Ellis then went into the board of brokers, and sold the remaining three hundred shares, at twenty. On the same day he notified the plaintiffs of these sales in writing, in the following terms:

"September 19, 1873.

"**MESSRS. COLKET & TEVIS:**

"**DEAR SIRS:**—We have sold for your account and risk, 300 L. high at 20 cash, to W. J. Sylvester; 100 do. do. to Gaw, Bacon & Co.; 100 do. do. to C. G. Phillips; 100 do. do. to W. H. Stevenson.

"Yours respectfully,

"**R. ELLIS & Co.**

"On account loan of \$16,000."

I find that the foregoing sales were made in good faith, at the market price of the stock on that day, and the stock delivered to the purchasers. That it was the understanding of the parties at 2½ o'clock, on the 18th, that the stock would be sold if the loan was not paid on the 19th; and that distinct notice was given to Tevis as early as 11 o'clock, on the 19th, that the sale would certainly be made that day, unless the loan was paid; that the interviews between Ellis and Tevis, on the 19th, were based on that understanding, and that at the final one, about 2 o'clock, Tevis, having exhausted his efforts to meet the call, acquiesced in the sales of the stock at the time, and in the manner they were made.

I find, further, that there is an established general usage among brokers, when a call loan is not paid on the day it is demanded, to sell out the collateral securities at the board of brokers, without further notice to the borrower; that both parties in this case were members of the board of brokers, both familiar with this usage, and both acted through-out the transaction on the basis of its validity, and its controlling effect upon their respective rights.

October 3, 1873. Defendants rendered an account, with the following letter:

"**MESSRS. COLKET & TEVIS:**

"**GENTLEMEN:**—We enclose a statement of balance due us by your firm. We have waited, we think, a long time for a check from you for the amount, and must ask your immediate attention to the matter.

"Very respectfully,

"**R. ELLIS & Co.**"

The account enclosed showed the loan of \$16,000, a credit of six hundred shares of Lehigh Navigation, at twenty, \$12,000, leaving a balance of \$4,000 due to defendants.

October 4. To this letter the plaintiffs made the following reply:

"October 4, 1873.

"**MESSRS. R. ELLIS & Co.:**

"**GENTLEMEN:**—Your favor of the 3d duly received. We are not in position at present to give check for amount of your claim. As soon as we are able to get our matters settled up we will communicate with you.

"Very respectfully,

"**COLKET & TEVIS.**"

In December, 1873, defendants brought suit against plaintiffs for the unpaid balance on above account.

February 2, 1874, plaintiffs made a tender to defendants of \$16,613.33, and demanded a return of the six hundred shares of stock, which was refused, and thereupon plaintiffs brought this action of trover.

The market price of Lehigh Coal and Navigation Company's stock on the day of the loan, September 17, 1873, was from 34½ to 35½, according to the terms; on the 18th there was a sale at 34½; on the 19th, the day defendants sold, the price was from 20 to 23, according to terms; on September 27, it was 20, having been up to 23½, as the highest price between the 19th and 27th; on February 2, 1874, the day of the tender, it was 43½; and the highest price between September 19, 1873, and the day of the trial was 51½.

There have been since September 17, 1873, dividends declared on the stock amounting to four dollars per share.

II. Upon the foregoing facts, I reach the conclusion that the sale of the stock by the defendants was not a legal injury to plaintiffs so as to support this action, because

First. It was authorized by the usage or custom of brokers, known to both parties, and with reference to which they conducted their transactions.

It was strenuously argued by plaintiffs' counsel that this was not a valid usage, as it was in contravention of the rule of law which requires a sale of collaterals to be public, and to be made after due notice. Several cases were cited to show that a custom cannot be allowed to contravene a positive rule of law: *Henry vs. Risk*, 1 Dall. 265; *Stoevers vs. Whitman*, 6 Binn. 417; *Evans vs. Myers*, 1 C. 114; and *Hursh vs. North*, 4 Wr. 241. In the first of these, the question was, whether interest could be charged upon the items of an account for goods sold and delivered, and the Supreme Court held that it could not, and that a custom of the trade in Philadelphia, to charge it, was not admissible. The scope of this decision is sufficiently indicated by the opening sentence of the opinion of the court: . . . "Shall interest be allowed upon the account . . . without any notice to the defendants that interest would be charged, or any agreement on their part to pay it?" But the same custom which was there declared inadmissible has since become so universal and well established, that it is now part of the settled law of the State: *Koons vs. Miller*, 3 W. & S. 271; *Adams vs. Palmer*, 6 C. 346.

Of the other cases cited by plaintiffs, *Stoevers vs. Whitman*, was an attempt to settle the construction of a ground-rent deed by a custom in a single town, and of the evidence proposed Chief Justice Tilghman says, it "hardly deserved the name of a custom." (p. 420.) *Evans vs. Myers*, was an attempt to control a statute by a custom, and in *Hursh vs. North*, the evidence was to the usage of a particular firm, and Judge Thomson concedes that if it had been of a general custom, it "would have been the law of the contract and both parties would have been bound by it." There are few rules of law more stringent and unbending than those which govern the liability of common carriers, yet a usage known to the other party, or so universal that he must be presumed to know it, will control and limit that liability: *McMasters vs. Penna. R. R. Co.*, 19 Sm. 374.

Without further reference to the numerous cases on this subject, I

think their effect may be summed up to be, that where no statute or principle of public policy intervenes, but a rule of law is a mere privilege which may be waived, there is no reason why the waiver may not be as well by a custom known to and acquiesced in by the parties, as by an express contract. Without intimating what would be the effect if such a usage as the present were set up against an outside party, I am of opinion that as between plaintiffs and defendants, both members of the board of brokers, familiar with and dealing on the basis of it, it is a valid and lawful custom and controls the rights of these parties.

Second. Independent of the custom, however, I am of opinion that the assent or acquiescence of Tevis in the sales of the stocks at the time and immediately before, is a sufficient defence to this action. *Volenti non fit injuria.*

Third. The letter of October 4, from plaintiffs to defendants, in reply to the latter's presentation of the account of the sales, showing a balance of \$4,000 due from plaintiffs to defendants, was an express ratification of the sales. This and the preceding ground do not seem to require further elaboration.

Fourth. Even if the letter of October 4 did not amount to an express ratification, the plaintiffs are nevertheless estopped, by their silence, from now disputing the sales. An account rendered becomes an account stated, if not objected to in a reasonable time: *Bevan vs. Cullen*, 7 Barr, 281; *Porter vs. Patterson*, 3 H. 229. What is a reasonable time must depend on the circumstances of each case. In this case all the circumstances require that time be counted rapidly. Property of most kinds varies in value but little from week to week, but stocks are sensitive to every breath that blows; not unfrequently they fluctuate from day to day, and in times of financial panic the steps in their decline are to be counted by hours if not by minutes. Plaintiffs received an account of sales on the afternoon of September 19. On October 3, they received another account, showing the balance due by them of \$4,000. In the month of December—the exact day not being in evidence—defendants commenced a suit for this balance, and not until an affidavit of defence was filed by the present plaintiffs in that suit, on January 23, 1874, did defendants receive notice of any objection to the sales.

In the meantime, the Lehigh Navigation stock had gradually risen, until when the tender and demand was made by plaintiffs, February 2, 1874, it had reached 43½. Had plaintiffs promptly objected to the account, and expressed an intention to hold defendants liable for the conversion, the latter might, on the 27th of September, have bought back the stock at the same price at which they had sold it, and avoided this present controversy. How much longer the stock remained at or about this price, the evidence does not show, but this is sufficient to demonstrate the importance of time in the question of ratification. Probably no safer way of speculating at another's risk could be invented than to make default, and induce a sale of collaterals on a depressed market, lie quietly by till the wave had passed, and prices were up again, and then tender the amount of the debt with legal interest. I desire to say, most explicitly, that no such design is to be attributed to plaintiffs here, but the possibility of such a thing is enough to show its utter repugnance to every principle of justice and law. Under the circum-

stances of this case, the delay of four months in objecting to the sale was so unreasonable, and the condition of defendants had in that time altered so materially, that it would be contrary to common honesty to allow the plaintiffs now to hold the defendants accountable for a loss, which was caused in the first instance by their own inability to perform their contract.

For these reasons, any one of which I deem sufficient, the decision is entered for defendants.

William C. Hannis, Esq., for plaintiffs.

Charles Henry Jones, Esq., for defendants.

Court of Common Pleas, Philadelphia.

No. 3.

[Leg. Int., Vol. 32, p. 82.]

In re APPLICATION FOR THE INCORPORATION OF "THE ENTERPRISE MUTUAL BENEFICIAL ASSOCIATION."

1. It must appear by petition or affidavit that at least three signers of articles of incorporation are citizens of Pennsylvania.
2. The articles must show the place where the business is to be transacted; the location of its office is not sufficient.
3. Notices of application for charter must be published in the *Legal Intelligencer* and two general newspapers.
4. Such notice should specify particularly the time and place of such intended application.

Opinion delivered *February 20, 1875*, by

LUDLOW, P. J.—Articles of incorporation of the first class were presented to one of the judges of this court under the act of assembly of 29th April, 1874, for approval. We are obliged for the present to withhold our indorsement for the following reasons:

1. It does not appear, that of the five persons who have subscribed, *three are citizens of this Commonwealth*. The act of assembly (sec. 3) is imperative, and the fact should appear by petition for the intended charter, or by an affidavit added to it. How, in the instance before us, can we know that the persons subscribing are not citizens of another State or foreigners?

2. In the paper before us, Article III. reads thus: "The place where its office is to be located is in the city of Philadelphia."

The act of assembly requires "the place or places where its business is to be transacted," to be designated. The intended charter is defective, in that it specifies no "place" of business within the meaning of the act. An *office* may be located in one city, and the real "place of business" may be in another Commonwealth. We must be satisfied upon this point that the act of assembly has been substantially followed before we indorse and approve any charter.

3. The act of assembly requires notice of an application for a charter to be published in "two newspapers of general circulation." The notice

in this case has been published in one newspaper of general circulation, and in the *Legal Intelligencer*.

The evident object of this requirement is to give notice to the general public of applications, which are matters of general concern, and to give as wide circulation as is consistent with a due regard to expense, it is confined to two newspapers of general circulation.

The publication in the *Legal Intelligencer*, under the act of 1855, is for another purpose, equally important, to wit: to provide one convenient medium in which *members of the bar* and others interested in any proceedings in the courts, may look for LEGAL NOTICES with certainty. These notices should, therefore, be published in two newspapers of general circulation, as well as the *Legal Intelligencer*.

Again, the notice in this case does not specify the time or place, when and where the application will be made.

The act does not seem to contemplate a hearing in court, but before any judge at chambers. The notice should, we think, be so complete, as to enable parties interested, and desiring to object, to do so, without inquiring of every one of the twelve judges of the several Courts of Common Pleas.

Approval, for the present, of this charter, must be declined.

[Leg. Int., Vol. 32, p. 188.]

WRIGHT vs. VICKERS.

A sale by the sheriff under proceedings in partition discharges the lien of a mortgage. The act of March 21, 1867, construed.

Sci. fa. sur mortgage. Motion for judgment for want of sufficient affidavit of defence.

Opinion delivered May 22, 1875, by

LUDLOW, P. J.—One of several tenants in common mortgaged his interest in an estate. Before the execution of the mortgage, proceedings in partition had been commenced. These proceedings were subsequently perfected, and as the estate could not be divided, it was under an order of sale sold, by the sheriff, and the question now to be decided is, did the purchasers at the sale take the land divested of the lien of the mortgage?

At the first reading, the act of assembly of 26th of March, 1867, 1 Purdon, page 479, p. 111, seems to be very sweeping and decisive of the controversy against the purchasers.

If the lien of the mortgage, the subject of this controversy, "shall not be destroyed, or in any way affected by any judicial or other sale whatsoever, whether such judicial sale shall be made by virtue or authority of any order or decree of any Orphans' or other court, or of any writ of execution, or otherwise howsoever," then an element of confusion has been introduced into our law, which will render it impracticable, if not impossible, to partition an encumbered estate, and will work the grossest injustice to those who are entitled to the protection of the courts.

To rescue this statute from a construction which will lead to such results, is not only our object, but our duty.

Tenants in common hold by unity of possession. Each, however, has a separate estate, which may be encumbered or sold.

Keeping in view the object of a partition, which is the equitable division of an estate among those entitled to it, we must remember the distinction pointed out by Gibson, C. J., in *Commonwealth vs. Pool*, 6 W. 33, when he said, that "a sale in partition works a conversion of form without a transmutation of essence, and this distinguishes it from a sale for payment of debts, of which transmutation is the primary and entire intent."

If this distinction be a sound one, then the sale in partition did not work an equitable conversion, for that conversion is "dependent upon the particular object to be attained by it," and the practical and legal effect of the partition was to designate the precise value of the estate, subject to the lien of the mortgage, and to which it attached. What difficulty is there then in holding, that the share of money belonging to this mortgagor, under these proceedings in partition, is in point of law as much land, although changed in form, as though an allotment had been made, and as such is bound by the lien of this mortgage?

Whatever estate the mortgagor had in this land is now gone, but the money made by the sale under the proceedings in partition, represents the share of the mortgagor in the land and its value, and for the purposes of this lien, is to be treated as land. We thus reach a conclusion, which, while it does not disturb the mortgage, accomplishes the object of the act of assembly, and an estate held in common and encumbered, may be partitioned according to the true intent and meaning of the law.

We do not consider in the determination of this case, the fact mentioned at the argument, that the share in money made by the sale, and belonging to the mortgagor, will not pay the mortgage debt, and for the reason that the sale measured the value of the estate held by the mortgagor in common with his co-tenants, and certainly the mortgagee is entitled to nothing more.

Rule discharged.

S. Henry Norris and *E. Spencer Miller*, Esqs., for rule.

John S. Gerhard and *R. C. McMurtrie*, Esqs., contra.

[Leg. Int., Vol. 32, p. 239.]

In re OREGON OR VINE STREET.

An ordinance for the widening of Vine street contained a proviso that the owners of the property should give security that no damages should be entered against the city exceeding \$1,000. As this proviso was not complied with, the report was set aside.

Exceptions to report of jury of view assessing damages. Opinion delivered *June 26, 1875*, by

LUDLOW, P. J.—Unless we are prepared to indorse a reckless expenditure of public money, and to inflict serious injury upon the property-holders of this city, we must, in cases of this nature, exact strict compliance with the law, and when, in any case, we find that the plain provisions of an ordinance have been violated, we must apply a remedy, which will be effective, because it will be radical.

Oregon or Vine street had been, in fact, open to the extent of sixty feet for years. No necessity, of either a public or private nature, re-

quired either the widening or paving of this avenue, and yet its width has been extended by twenty feet, and it has been paved, while damages have been awarded *against the city alone* for the land taken, etc., to the extent of over \$50,000. Under the road law of 1836, a jury of view alone could have ordered this street to be opened, but by the act of 1855 the councils of the city, if "the public exigency" required, may order streets to be opened on three months' notice.

In the case now before us, an ordinance was passed directing this street to be opened, but a very important proviso was added to it, to wit: That before the street shall be opened, the owners of the property should, by a bond, give security, that damages against the city should in no case exceed \$1,000.

The regular three months' notice to property-holders was given, the provision of the ordinance *was never complied with*, and the result is, that in the very teeth of the law damages to a very large amount have been awarded against the city.

It was argued at the bar that the power of councils was limited to the mere declaration of the fact that an exigency existed. While we do not intend now to express an opinion upon the general question, it is clear enough that councils did in this case say, that the exigency did not exist unless the city could be protected against heavy damages, and hence the proviso, so far from being repugnant to the other parts of the law, and hence, under the authorities, became void, and was an essential part of the ordinance, and as such created a condition precedent, without the performance of which the whole ordinance became practically null and void.

The only argument which stands in the way of this construction is the one based upon the fact that the city has waived her right to complain, because by virtue of a subsequent ordinance the street was ordered to be and has been actually paved. The answer to all this is, that the property-holders received the three months' notice to open the street, and of the proviso contained in the ordinance, and must have had, in point of law, notice.

A duty was cast upon them to prevent the taking of the land by injunction or otherwise, and if they neglected to discharge this duty they cannot claim damages now under the award of this jury.

If the whole proceeding has been in point of law void, the owners of the land taken have lost nothing, for they can reclaim it, and how far they will be obliged to pay for the paving in front of their respective lots is a question which, at this time, and under these exceptions, we are not called upon to settle.

We may add, that we are not at all satisfied with the amount of damages awarded, and, on the whole, we have determined to sustain each and all of the exceptions filed of record to the report of this jury.

Robert N. Willson and Wm. Grew, Esqs., for city exceptants.

Joseph R. Rhoads, Wm. P. Messick, A. A. Grace, George L. Crawford, A. V. Parsons and Jos. A. Clay, Esqs., for exceptions.

[Leg. Int., Vol. 32, p. 256.]

LEECH vs. BONBALL.

A mortgage was made on a large lot of ground, which lot was afterwards subdivided and improved, and sold by the sheriff on proceedings on the mortgage. *Held*, that the proceeds of each lot should be applied to the payment of the mortgage in equal proportions, although some of the lots brought a larger price than the others.

Exceptions to auditor's report. Opinion delivered July 10, 1875, by FINLETTER, J.—The fund in court arises from the sale under a first mortgage of a lot of ground containing in front on Sixty-third street 200 feet. After the mortgage was made, the property, being unimproved, was divided into four lots of fifty feet each fronting on Sixty-third street, of equal value. They were subsequently improved by the several owners.

The property was sold in four lots, as follows: No. 1 for \$1,250; No. 2 for \$1,250; No. 3 for \$50; No. 4 for \$2,000.

No. 3 is practically out of the question here raised.

The auditor charged each lot with one-third of the mortgage and awarded the difference between that and the amount the lot brought at the sale to the owner.

It is contended by the exceptant that each lot should have been charged with the mortgage in proportion to the price it brought at the sheriff's sale.

The doctrine of contribution, upon which the exception must be determined, is based wholly upon equity. Its object is to produce equality, and to distribute responsibility according to the interests involved. The burthen resting upon the whole is made to bear equally upon the several parts. The relative values of the several parts become, therefore, important elements in questions of this character: *Fisher vs. Clyde*, 1 W. & S. 544; 2 Dallas, 189; 1 Barr, 129.

The Supreme Court, whilst enforcing the doctrine of contribution, has given no general rules for our guidance in all cases. Each case presents its own peculiar equities which control its settlement. If the object of contribution be kept in view the decisions will be harmonious. In *Carpenter vs. Koons*, 8 Harris, 222, the values as settled by the sheriff's sale were recognized, but held not to be conclusive, and only a circumstance to be considered. The conclusion from all the cases is, that any method that fixes the true values would be the proper one.

The question as to the time when the values should be fixed, when, as in this case, the several equal parts of the land have been unequally improved after the incumbrance has been placed upon the whole land, has never been settled.

If the time of the sheriff's sale, or any other time after the improvements have been made, be inflexibly adopted, it is obvious that great injustice might be done.

In the present case the purparts were equal in extent and value. Whilst unimproved they were equally liable for the mortgage. How then could their improvement change that liability? The improvement upon No. 4 did not and could not affect the value of No. 2. Why then should it assume a portion of the liability of No. 2?

The peculiar equities of this case require us to consider the values of the several parts at the time the mortgage was placed upon the whole land, as the proper values upon which their several liabilities arise. In this we do no violence to the decisions of the Supreme Court. We do but apply the principles of these decisions to a condition of facts not yet brought to the consideration of that tribunal. The auditor has substantially carried out these views. The exceptions are therefore dismissed, and the report confirmed.

[Leg. Int., Vol. 32, p. 464.]

**COMMONWEALTH *ex rel.* W. H. BOILEAU AND MARGARET JONES *vs.*
THE MOUNT MORIAH CEMETERY ASSOCIATION OF PHILADELPHIA.**

1. A private claim to the right of interment in a cemetery lot will be enforced by mandamus.
2. A provision of the charter of a cemetery company which prohibits the transfer of lots without consent of the managers, is binding upon grantees, and a transfer without such approval passes no title.
3. A lot-holder who has executed and delivered a deed of transfer of his lot, unapproved as aforesaid, still has the right to order and compel an interment in said lot.

Sur petition for mandamus. Opinion delivered *December 24, 1875*, by

LUDLOW, P. J.—This cause must be decided upon purely legal principles. If the relators in this bill, or either of them, can maintain their present application, it must be because their rights are based first, upon the charter, by-laws and regulations of the cemetery association, and the conveyance or conveyances under which they, or either of them, claim title; and, secondly, upon the peculiar nature of the remedy now invoked.

It is to be observed that the lot-holders in this cemetery do not purchase a mere easement, but a title in fee simple, "subject to the conditions of the act of incorporation, under the rules and regulations adopted by the managers of the said Mount Moriah Cemetery Company," and this clause in the deeds executed by the corporation, distinguishes this case from the ordinary grant of a pew in a church edifice, and takes it out of the established line of decisions referred to by the court in *Kincaid's Appeal*, 16 P. F. S. 411. In that cause the distinction is noted, for in the decision such language as the following is used: "We cannot, however, consider the certificate as evidence of a grant to the lot-holders of an interest or title in the soil;" and again: "Had it been so intended, it would surely have contained words of inheritance. . . . The grant of a pew in a church edifice, in perpetuity, does not give to the pew-owner an absolute right of property, as in a grant of land in fee."

The relators have, or one of them, by the act of the defendants, has a fee simple in the lot.

Undoubtedly the ground thus held can only be used for the purpose of sepulture, and this right, if it exists in either of the relators, is absolute. A body is brought to the grave for burial: how can a remedy be provided except by mandamus, if then and there the corporation refuse to permit the body to be deposited? This cause is not like the mere disturbance or obstruction of an easement for which damages may be

recovered, as in the case of a pew-owner, who has generally a limited usufructuary right only, and who may recover damages for its destruction or loss; nor is it analogous to the class of cases in which equity would decree the specific performance of a contract, because the remedy must be speedily applied. The very function of the writ of mandamus is to set in motion and compel action, and any existing legal remedy relied upon as a bar to interference by mandamus, must not only be an adequate remedy in the general sense or the term, but it must be specific and appropriate to the particular circumstances of the case: High. Ex. Legal Remedies, pp. 12-19. Being of the opinion that no legal remedy can be applied in cases of this kind, except by the exercise of extraordinary power, I proceed to consider the other propositions of law involved in this case.

The charter of this corporation is the law of its being, and that charter must be strictly construed.

By section 4, the corporation may sell and dispose of lots in "fee simple or otherwise," and by section 9 "every lot in said cemetery shall be held by the proprietor for the purpose of sepulture alone, transferable with the consent of the managers thereof." It is admitted by the pleadings in the case, that the conveyance by Boileau to Margaret Jones was never made with the consent of the managers as such, and any knowledge of the fact by the secretary or superintendent is expressly denied by the answer.

Unquestionably, in my judgment, any transfer without the approval of the managers, was in direct violation of the organic law of the corporation, and vested no title in Mrs. Jones; the corporation being the paramount owners of the soil, conveyed to Boileau, "subject to the articles of incorporation under the rules and regulations" of the company. As the undisputed owners, they undoubtedly could incorporate any covenant in their conveyance not prohibited by public policy, and the article of the charter which prohibits a transfer to any person without the approval of the managers, is a covenant binding upon the grantee in the deed.

Even if I am mistaken in my view of the law upon this point, the question of title in Mrs. Jones is at least doubtful, and if the case ended here, I should, without hesitation, refuse this writ. There is, however, another relator, and his rights are now to be considered in the final disposition of the cause. It is admitted that Boileau is an owner in fee, "subject to the conditions of the act of incorporation under the rules and regulations adopted by the managers" of the cemetery, of the lot specified in the pleadings. Upon the 27th day of September, 1875, he indorsed upon a letter written by the superintendent to Mrs. Jones the following:

"Dear Sir:—Please let the bearer bury in the lot."

This letter reads as follows:

"MOUNT MORIAH CEMETERY, September 27, 1875.

"MRS. ELIZABETH JONES:

"MADAM:—I am in receipt of a note from you requesting a grave to be dug in No. 48. . . .

"I am unable to comply with your request, because the lot in ques-

tion is registered as belonging to William H. Boileau, and the rules of the company require me to act only under the orders of the registered owner of the lot.

Very respectfully,

"H. P. CONNELL,

"Superintendent."

The sixth by-law declares, among other things, "that no interment shall take place without a written permit from the secretary."

Undoubtedly the by-law is a reasonable and legal one, and ought in a proper case to be enforced, but under it, can the owner in fee simple be refused the exercise of any right which is incident to an absolute ownership?

The answer of this question depends upon the nature of the right claimed, the time when and manner in which it is proposed to exercise it, under the very terms of the charter and by-laws of the corporation.

It is not contended here that any objection can be made to the manner in which it was proposed to bury Henry Jones, nor to the time when it was intended to inter his body. The only question then remaining is, what was the nature of the right by virtue of which the relator Boileau claimed to act?

Untrammelled by charter or by-law, it is clear that Boileau might bury whomsoever he saw fit in his own lot.

Under the charter, by section 4, the ordinary rights of an owner were only so far restrained, as to limit the use of the lot to the "sepulture of individuals, societies, or congregations, without distinction or regard as to sect." There is here clearly no distinction in terms as to nationality or color, and the word "sect" necessarily includes any number of individuals, who compose the membership of a congregation or society, united in some settled tenets, or who follow the teachings of a certain leader.

It would seem, therefore, that while individuals may be buried by the owner in fee simple of a lot, in said lot, without distinction of nationality or color, no objection can be made because any individual is a member of a society or congregation, commonly called a "sect."

But it may be contended that by virtue of some section of the charter and by-laws, "some condition, rule or regulation," may limit the exercise of a right which belongs to every owner in fee of the soil.

In his letter to Mrs. Jones, the secretary of the company refused to give her the usual permit, because Boileau was the owner of the lot, and thereupon, Boileau, under the regulation concerning "permits," demanded a permit, when he indorsed upon the letter the words, "please let the bearer bury in the lot."

What additional condition, rule, or regulation was to be complied with?

We have already seen that *individuals* without distinction of "sect" may be buried by an owner in fee of a lot, in the cemetery, and we have searched most carefully throughout the charter and by-laws to find a single additional condition, rule, or regulation upon the subject.

While the usual rules exist for the adornment of the grounds, depth of graves, payment of charges, etc., the only by-law which limits the right to bury an individual, is the 10th, which declares that no person who dies of small-pox, or other contagious disease, shall be permitted to be

deposited in the receiving vault, and that no permit shall be granted to a stranger to use the vault without the payment of a certain fee.

It is to be observed that the action of the managers on the 30th June, 1875, related only to the transfer of lots, for upon that day, at the request of certain petitioners, it was resolved "that the officers be directed to refuse to make such transfers."

We have already expressed an opinion as to the power of the company to control the transfer of lots, but that question does not arise where the undisputed owner of the ground sees fit to exercise his right as owner, where that right is not limited by charter, by-law, condition, rule or regulation, and is in fact absolute. I see nothing in the other points made in this case and not covered by the foregoing opinion, because, if the relators are improperly joined, an amendment will at any time be allowed; the executors ought not to be made parties; and a disputed question of title does not arise, for Mrs. Jones claims either in her own right or under Boileau, and therefore makes no adverse demand.

On the whole case I am therefore of the opinion :

First. That Margaret Jones has no legal title to the lot in question, and that the refusal to sanction the transfer of the lot by Boileau to her, was within the corporate power of the managers of the cemetery.

Second. That the relator, William H. Boileau, as the owner in fee of the ground, had the legal right, as an incident to his ownership, to bury the body of Henry Jones in the lot so owned by him; and that the refusal to issue a permit for that purpose, was, under the charter and by-laws of the corporation, an arbitrary and unreasonable, and therefore, an unlawful interference with the legal rights of the owner of the soil.

Dissenting opinion by LYND, J.

I dissent:—1. That Boileau, upon his own showing, having parted with his title to the lot in question, has no standing, even in an ordinary proceeding at law, to demand judicial interposition.

2. That even if he had a right of action, the act of which he complains, to wit, the refusal to permit the interment of a colored person, is, under defendant's charter, within the discretion of the managers; and that, under the allegations contained in the second paragraph of the sixteenth section of the return, admitted by the demurrer, that discretion has been rightfully exercised.

3. That even if the right of action and the violation of that right existed, as Boileau contends for, he is not entitled to a writ of mandamus, because his remedy by an action upon the case would be an adequate remedy—particularly so, when the enjoyment of his lot, which is interfered with, is such enjoyment as a white speculator in burial lots may derive from burying the body of a colored person to whom he had conveyed the lot.

Concurring opinion by FINLETTER, J.

I concur in the judgment of the court, but differ from that part of the opinion which held that Mrs. Jones derived no title from Boileau, having no doubt that she acquired a perfect title.

Wm. H. Browne and William S. Price, Esqs., for relators.

Henry C. Titus and E. Spencer Miller, Esqs., for respondents.

Court of Common Pleas, Philadelphia.

No. 4.

[Leg. Int., Vol. 32, p. 21.]

DALY vs. PETROFF.

1. The numbering of the ballots required by the new constitution is a wise provision, intended as an additional safeguard against fraud, and whenever votes have been received and counted which are shown to have been illegal, and which, if thrown out, would alter the result of the election, the court will order the ballot-boxes to be opened, in order to ascertain for whom the illegal votes were cast. But the court will not order this to be done unless the illegal votes proved are sufficient in number to alter the result of the election.
2. An election may be characterized by such an amount of fraud, and be attended by circumstances evincing such a total disregard of the election laws, and of the rights of the honest electors, as to require the court to throw out the entire return from the division in which these wrongs have been perpetrated. But the power to throw out an entire division is one which ought to be exercised with the greatest care, and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes were lawful and what were unlawful, or to arrive at any certain result whatever; or where the great body of the voters has been prevented by violence, intimidation and threats from exercising their franchise.

In the matter of the contested election in the Fifth legislative district. Opinion delivered *January 9, 1875*, by

THAYER, P. J.—It appears by the official return of the election held in the Fifth ward of the city of Philadelphia, on the 3d of November, 1874, that Emil Petroff received for the office of representative in all the election divisions of the ward, an aggregate vote of 1,390, and that Philip Daly received an aggregate vote of 1,151 votes. Mr. Petroff's majority, therefore, is, by the official return, 239 votes over Mr. Daly. We may assume that the evidence which has been submitted to us shows that in the 11th division Mr. Daly received 22 votes instead of 18, being 4 more than the number given him in the official return. Some 16 persons in the various divisions are specifically named who are alleged by the complainants to have voted who were not qualified voters. As to some of these the proof is altogether defective, and for whom they voted does not appear. The latter point might probably be determined with certainty by opening the ballot-boxes and comparing the numbers on the ballots with the numbered names on the tally-lists—a test which we were asked by complainant's counsel to apply, and which we would certainly have resorted to with alacrity if the result of such an investigation would have altered the general result of the election. The numbering of the ballots required by the new constitution is a wise provision, intended as an additional safeguard against fraud, and presenting a ready means of correcting the return by the examination of the illegal votes. It is a touchstone which may be properly applied in every case where a vote has been received and counted which is shown to have been illegal, and which, if thrown out, would alter the result of the election. But it must be quite apparent to every one that if it be assumed that the 16 persons whose votes are attacked were all illegal voters, and that they all voted

for Mr. Petroff, his election by a very considerable majority is still a fixed fact. If the votes attacked by the complainant are deducted from his poll, and the four additional votes claimed by Mr. Daly in the 11th division are added to his 1,151, Mr. Petroff's majority will still be 219. It is obvious, therefore, that it would be only a useless waste of time for the court to send for the ballot-boxes of the various divisions in order to trace these votes, and to ascertain by their respective numbers for whom they were cast.

The complainants foresaw this clearly, and hence have not rested their case upon it. It was quite plain to them, after investigation, that the return of Mr. Petroff could not be successfully attacked by any pursuit of individual voters, or by any reformation of the vote or readjustment of figures in the several divisions. They have accordingly directed their attack against entire divisions, and the court is appealed to to throw out these divisions altogether, and to say that the votes of their inhabitants shall not be regarded in determining the election of the representative. The divisions which we are thus asked to discard are the 11th, 16th and 10th. Five hundred and eleven votes were cast in these divisions—nearly one-fifth of the whole number in the district. Undoubtedly an election may be characterized by such an amount of fraud, and be attended by circumstances evincing such a total disregard of the election laws and the rights of the honest electors as to require the court to throw out the entire return from the division in which those wrongs are proved to have been perpetrated. This must be the case whenever the election has been conducted in such a fraudulent and unlawful manner as to render the result altogether uncertain and unreliable. If it were not so, the honest voters of the other divisions might easily be overwhelmed and virtually disfranchised by the fraud and violence which may reign in a particular locality. It is better that one or more diseased members should be cut off, than that the whole body should suffer political paralysis and death. But the power to throw out an entire division is one which ought to be exercised with the greatest care, and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes were lawful and what were fraudulent, or to arrive at any certain result whatever. Such a case can hardly arise, except where the election officers are themselves participants of the fraud, and in league with the chief actors in it, or where the great body of the voters is deterred by violence, intimidation and threats from the exercise of their franchise.

After the most deliberate and attentive examination of the evidence in this case relating to the holding of the election in the divisions which we are asked to throw out, we are of opinion that it by no means discloses such a state of facts as would justify us in the use of such a power. It is a severe remedy, never to be resorted to except in a very plain case—a case in which it is necessary to decide which shall be disfranchised, the voters of the offending poll on the one hand, or the majority of the electors of the whole election district on the other. The wheat and the tares are not to be burned up together, if by any possibility they can be separated. There is considerable evidence tending to show that

fraudulent voting was attempted by a number of voters in the 11th, 16th and 10th divisions of the Fifth ward. The evidence does not show that it was to any great extent successful. Much of the evidence is of a very loose and unreliable character. That of the witness Simpson, who is the principal one relied on to show the alleged frauds in the 11th division, is of this character, and he is flatly contradicted by James Flood, the democratic inspector of the same division, who declares that the election was conducted in a perfectly fair manner. The election officers were regularly sworn, and the election was, according to the weight of the evidence, conducted in an orderly manner. Some persons presented themselves to vote whom Mr. Flood suspected of personating other persons. He did not know them, but challenged them. The challenges were regarded. The challenged parties came inside, were examined on oath, made the requisite affidavits and were vouched for before their votes were received. The statement of Simpson, that one Mason voted ten or twelve times in the 11th division, and James Sickles half a dozen times, is totally incredible in view of its lack of corroboration by the other officers of the election, and of his own confession that he received the fraudulent ballots knowing them to be such, although he had been solemnly sworn not to receive any vote from any person not entitled to vote. Mr. Molineux, who voted the democratic ticket, and had charge of the window-book, testifies, that some persons *tried* to vote on other names than their own, but he cannot say that they voted, and does not remember that Sickles voted more than once, although he was in a position in which he must have known it if it had occurred. Mr. Molineux swears to only one unlawful vote—that of the man who voted on the name of Anderson. When we consider that neither the democratic inspector, nor the democratic overseer, in the 11th division, nor the democratic keeper of the window-book outside, corroborates the statements of Simpson, and that Simpson's credibility, without corroboration, is destroyed by his own confession of the nefarious part which he himself bore in the transaction which he relates, it would be most unjust upon the strength of such statements to throw out of the count the votes of all the electors who voted in the 11th division.

With regard to the 16th division, Mr. McNeil, who was United States supervisor in that division, testifies, that the conduct of the election officers was fair. He mentions two men who were permitted to vote whose names had been stricken off the list by the court upon the purgation of the lists—John and Oliver Hawkins. He challenged them; they produced vouchers, and their votes were received. It cannot be pretended that the correction of the registry by the assessors, under the supervision of the court, which is an *ex parte* proceeding, can take away any man's right to vote who is lawfully qualified; for it is expressly enacted by the 10th section of the act of 30th of January, 1874, that on the day of election any person whose name shall not appear on the registry of voters, shall, nevertheless, be permitted to vote if he possesses the necessary qualifications and complies with the prescribed formalities. Mr. Blackburn, who was the democratic inspector of the 16th division, testifies, that although he saw a good many votes which he suspected, he cannot give the name of a single person who voted illegally, and he swears that there was a fair count. John N. Blackburn, who was a clerk in the same division, and, like the others,

was a witness produced by the complainants, testifies that it was a fair election. It is difficult to see how we can justly throw out the votes of entire divisions when the complainants' own witnesses testify that the election officers conducted themselves in a proper manner and complied with the provisions of the law, and that the election was a fair election. Such a proceeding would be a most dangerous precedent, and would inflict a great wrong upon the voters of those divisions. Much stress was laid by counsel upon the evidence of Richard H. Paul, which went to show that he, with others, was engaged on election day at a house at 506 South Sixth street in giving out tax receipts to persons who were to personate voters upon the registry lists in the 11th and 16th divisions. Paul was, by his own confession, not only a fraudulent voter himself, but engaged in a conspiracy to manufacture fraudulent voters. His testimony is, therefore, to be very cautiously received; but it is clear that the rights of the electors of those divisions cannot be taken away by reason of anything which did not occur at the polls and enter into the election itself, and it is not shown by the evidence that the persons who went to Paul to get tax receipts voted in either division. What was done between Paul and those who were, if his story is to be believed, his coadjutors in crime, cannot justify us in depriving the citizens of the 11th and 16th divisions of their votes for a representative, since it is not shown by the evidence of Paul, if he is believed, that more than five of the illegal voters whom he assisted to manufacture, actually voted, viz., Fitzgerald, Keim and Paul himself in the 11th, and Burns and Primus in the 16th division. We cannot, on that account, say that the 333 votes which were cast in those divisions are to be cancelled and struck out of the general result.

It was also argued that the vote cast in the 11th division ought not to be counted, because, after the election, the boxes containing the ballots and papers were removed to the house of Mr. Holzman, who was the democratic overseer of the election, to be counted. This was done with the concurrence of all the officers of the election, and the reason for doing it was this: the election was held in an open bar room, at the southeast corner of Sixth and Lombard streets, there being no partition between the election officers and the other part of the room. It was probably considered an unsafe or inconvenient place in which to proceed to count the ballots. They were accordingly carried by the common consent of all the election officers, both republican and democratic, to the house of Mr. Holzman, the democratic overseer, which was in the division, as well as in the neighborhood. The officers accompanied the boxes and counted the ballots there. It is not, and cannot, upon the evidence, be pretended that they were taken there for any fraudulent purpose. On the contrary, the testimony shows conclusively that it was done in good faith, that the boxes remained untouched, and the votes were fairly and honestly counted. It was an irregularity in the officers, which ought not to be imitated, but which furnishes no sufficient reason for throwing out the division, and depriving the voters of their rights.

As to the 10th division, although there is considerable evidence in regard to individual fraudulent votes, the illegal votes actually proven are very few, compared with the number of votes cast in the division,

which was 178. Mr. Tisdall, who had the window-book there, and is the complainant's witness, testifies, that the election was conducted in an orderly manner. He states that some names were voted which had been stricken from the registry, and some which were not upon it, but they were vouched for before they voted. The number of them, of both classes, named by him, is five: Jones, Johnson, Stokley, Poole and Reed. There were four democratic officers inside the poll of the division, inspector, clerk, overseer and supervisor. Mr. Stone, who was inside the poll, and is the complainant's witness, testifies that he saw nothing fraudulent or unfair about the election, except that a man was struck while putting in his vote. The man struck was a colored man; who struck him the witness does not know, and the circumstance is certainly not of such an unusual character as to destroy all the votes cast at that poll. Mr. Stone further says, that the vouchers, when they were called, subscribed affidavits, except when the voters for whom they vouched were on the list. Mr. Henkels, a witness for the complainants, was the democratic inspector of the 10th division, and cannot testify to any frauds committed there. But it is unnecessary to go through the evidence any further in detail. It is enough to say that it is totally insufficient to justify this court in depriving the voters of the 10th division of their just weight in the decision of the question of who is to represent them in the General Assembly of this Commonwealth.

On the whole case, for the reasons already stated, the court is of opinion that the complainants have not shown any state of facts which would justify the court in decreeing that the return of Emil Petroff for the office of representative of the Fifth district, is false or fraudulent, or that the said Philip Daly was duly and legally elected to said office.

Wherefore, it is considered, adjudged and decreed, that at the election held on the 3d day of November, A. D. 1874, Emil Petroff received the greatest number of legal votes which were cast in the Fifth ward of the city of Philadelphia, for the office of representative of the Fifth district in the House of Representative of the Commonwealth of Pennsylvania, and is entitled to the certificate of election.

[Leg. Int., Vol. 32, p. 40.]

COMMONWEALTH *ex rel.* BRECHEMIN *vs.* THE HIBERNIA FIRE ENGINE COMPANY.

The provision contained in the 3d section of the act of 28th May, 1872, relating to the dissolution and surrender of charters of fire companies in the city of Philadelphia, which confines the distribution of the effects of such companies to active members and those who have been placed on the roll of honorary members as a reward for active service, is constitutional, and contributing members and life-members are not entitled to participate in such distribution.

Mandamus. Sur demurrer to answer. Opinion delivered *January 23, 1875*, by

THAYER, P. J.—The relator rests his claim to participate in the distribution of the corporate property upon the allegation that he was a life-member. The answer is upon that head evasive and argumentative. It avers that the relator was never *elected* a life-member, whereas, it is declared in the 20th by-law, section 6, that any contributing member

having paid over to the assistant-secretary the sum of twenty dollars shall be *entitled* to become a life-member. It does not appear, therefore, that in order to transform a contributing into a life-member any election is necessary. Nor is there any reason whatever to suppose that such a useless formality was intended to be required. A life-membership was a mere compounding of their annual dues by contributing members who had been previously elected such. Upon the payment of twenty dollars one who had been elected a contributing member thereby became a life-member without any further ceremony. The matters of evidence set forth by the defendants in their answer, as for example, that the books of the company do not show that the relator paid the twenty dollars, cannot stand in the place of that explicit denial of the relator's membership, which they were bound to make if they intended to put these facts in issue. If life-membership, therefore, entitled a party to participate in the distribution which is to be made under the act of assembly, approved May 28, 1872, P. L. 1171, we should have no difficulty in giving judgment against the defendants on the demurrer, for the reason that their denial of the plaintiff's life-membership is evasive, argumentative, and altogether insufficient. But behind the question of the sufficiency of the answer lies the important question, whether the relator, conceding that he was a life-member, has any right to participate in the distribution. If he has not, then he has failed in his petition to show any right to the relief which he prays for, and judgment should be for defendants.

Section 3 of the act of 28th May, 1872, confines the distribution "to such members of the company as were required to perform active service as a condition of membership, or who may have been transferred from the active roll to the roll of honorary members as a reward or token of recognition for previous active service." It is conceded that the relator is neither an active nor an honorary member, and that he must be excluded from the distribution if this provision of the act is to be enforced. But the relator contends that this section of the law is unconstitutional, that as a life-member he has a right of property in the effects of the dissolved corporation of which he cannot be deprived; that his right to distribution has a higher source than the act of assembly and cannot be impaired by it. It is necessary briefly to examine this claim. At common law upon the civil death of a corporation the real estate which had belonged to it reverted to the grantor and his heirs, and the personal estate, in England, vested in the king, in our own country, in the people or State. The consequences which at common law follow the dissolution of a corporation are usually averted by some provision in the charter, or by general or special statutes. Indeed, this has been so uniformly the case that practically the common law rule is never applied to dissolved joint stock, trading, or moneyed corporations. As to creditors, they would seem to have an equitable right to satisfaction of their claims out of the assets, which even the State, in the exercise of its *jus disponendi*, cannot lawfully disregard: *Curran vs. State of Arkansas*, 15 Howard, 312. Our act of 9th April, 1856, P. L. 293, relating to the voluntary surrender of corporate powers and franchises, directs that the accounts of the managers shall be settled in the courts in which the surrender is made, and that "dividends of the effects shall be made among any cor-

porators entitled thereto, as in the case of the accounts of assignees and trustees." If any one should suppose that this gives any color for the opinion that the corporators or trustees for the time being of a dissolved charity can divide the property which belonged to the charity among themselves, such an opinion must be immediately corrected by the *proviso* to that act, which declares that "no property devoted to religious, literary or charitable use, shall be diverted from the objects for which they were given or granted." If this *proviso* had been omitted from the act, and the words authorizing dividends of the corporate effects among the stockholders had been held to apply to eleemosynary corporations, the act would have been an engine of stupendous wickedness and injustice, for it would have afforded a ready means by which the corporators for the time being of any charity might, under the color of a surrender of corporate rights, plunder the charity which it was their duty to protect. The act referred to stands as a sufficient legislative authority for dividing the property of a joint stock, trading or moneyed corporation, which has voluntarily surrendered its corporate rights "among any corporators entitled thereto," after the payment of its creditors, who have the first equitable right. But as to eleemosynary corporations, which have come to an end by reason that there no longer exists any necessity for the charity, or any objects upon which it can act, or which for any other reason have surrendered their corporate existence, we entertain no doubt that the power to dispose of their property resides where it has always resided in this country, with the Legislature, and that the distribution or application of such property is not regulated by the act of 1856. Even if it had been it was quite competent for the Legislature, by a subsequent act, to make a new rule for a particular case, and upon that ground their action in the present case cannot be open to question.

If, then, the Hibernia Fire Engine Company—an association which has existed for more than a hundred years—is an association incorporated exclusively for charitable purposes, the present members have no natural, legal, or constitutional right to appropriate to themselves the property of the corporation on its dissolution. They are not owners of the property, but mere trustees and instruments for carrying on the charity. They can set up no claim to the property which is not derived from a legislative grant. The power to dispose of such property rests with the Legislature alone, and whoever sets up a claim under its authority must show that they are within the words of the grant. The relator is clearly not within these words, and for that reason his claim must fail. The 6th article of the constitution of this company declares, that "the object of the corporation shall be the promotion of the public good by the extinguishment of fire." Its time-honored motto was, "To assist the suffering and protect the weak." Its history, its constitution, its by-laws, show too plainly to admit of doubt that it was a charitable association, with not the smallest element of selfishness or personal gain or profit in its objects or undertakings. Upon its dissolution its effects become the property of the State and are subject to the disposal of the Legislature. By the act regulating that disposal the distribution is to be confined to active members, and to those who have been transferred to the roll of honorary members as a reward for previous active service. We are unable to see that in directing this disposition of the property

the Legislature infringed upon any vested right of the relator, or violated any article of the constitution.

Judgment for the defendants.

P. T. Ransford, Esq., for plaintiff.

W. S. Hage, Esq., for defendant.

[Leg. Int., Vol. 32, p. 66.]

POTTER *et al.* vs. HOPPIN *et al.*

Trustees guilty of a breach of trust, who have lost the trust assets, and who have assigned property of their own to another as security, or in trust for the benefit of the *cestuis que trust*, cannot have a decree for an account against such third person without joining the *cestuis que trust* or restoring the trust assets.

The assignee of such property, under such circumstances, becomes a trustee *de son tort*, and is accountable directly to the *cestuis que trust*.

A decree for an account cannot be had where defendants show a personal liability for what is asked.

A distributee of purchase-money cannot dispute the purchaser's title.

Exceptions to the master's report. Opinion delivered *February 13, 1875*, by

ELCOCK, J.—Matthew Conrad, who died in the year 1851, by his last will devised to his executors, William C. Conrad, George W. Conrad, William A. Potter and John B. McKeever, the sum of \$10,000 in trust, to put or place, and keep the same out at interest on good real security until his grandson, Matthew Conrad Hoppin, should have attained the full age of twenty-one years, when said sum should be paid to him, and in the meantime to collect the interest as it should become due, and re-invest the same from time to time during such period, when all said accumulations of interest should be paid over to the brothers and sisters of the said Matthew Conrad Hoppin.

A bequest of precisely the same nature was made of \$10,000 in favor of another grandson named Matthew Conrad, with the accumulated interests to the brothers and sisters.

The said executors and trustees received the estate of Matthew Conrad, deceased, but instead of investing the said \$20,000 according to the directions of the trust, they placed it in a commercial business, in which William A. Potter and William C. Conrad, two of them, were interested, and carried on under the firm-name of Potter, Conrad & Co.

In the year 1857 the firm of Potter, Conrad & Co. became insolvent, and the trust moneys were involved in the general wreck. Before the insolvency, however, on May 5, 1855, the said trustees accepted from two of their number, William C. Conrad and George W. Conrad, a mortgage upon certain mill properties at Fairmount, for the sum of \$27,233, to secure said trust moneys.

Upon November 23, 1857, the three remaining trustees (McKeever having previously been discharged) executed an assignment under seal, transferring and setting over to Henry Hoppin the bonds of William C. Conrad and George W. Conrad, secured by said mortgage, with other assets amounting to \$13,842.31, in trust to, for, and upon the uses, intents and purposes as are mentioned, expressed and declared, in and by the last will and testament of Matthew Conrad, deceased, of and concerning the sum of \$10,000, thereby given and bequeathed to his said executors in trust until his grandson, Matthew Conrad Hoppin, should

have attained the full age of twenty-one years. A similar assignment was made to George W. Conrad in trust in like manner, concerning the \$10,000 bequeathed to Matthew Conrad, the son of said George W. Conrad.

In December, 1857, the mill properties were sold at sheriff's sale, the aforesaid mortgage was divested, and the assets passing under said assignments became worthless. About this same time promissory notes of various parties amounting to \$27,983 were delivered by the two trustees, William A. Potter and William C. Conrad, to Henry Hoppin and George W. Conrad, solely to secure the said trusts and to take the place of the assets previously delivered under said assignments, and which had become worthless. Out of these assets thus assigned in trust, Henry Hoppin and George W. Conrad, or Henry Hoppin for both, appear to have realized the sum of \$21,555.18.

At the sheriff's sale of December, 1857, Mrs. Caroline Potter, the wife of William A. Potter, one of the trustees, became the purchaser of the mill properties at Fairmount, and having received the sheriff's deed, she, in conjunction with her husband, on December 19, 1857, executed a declaration of trust, wherein she recites the facts in relation to the said legacies under the will of Matthew Conrad, of the mortgage, of the purchase, of the delegation by the trustees under the will of all power and authority to Henry Hoppin and George W. Conrad, over the trusts in favor of their respective children, etc.; and declares that she holds the said premises subject to and as security for the aforesaid unpaid legacies under the will of Matthew Conrad, deceased, etc., and reserving power to sell and power of revocation, etc.

Mrs. Potter having, therefore, possession of the real estate, and Mr. Hoppin possession of \$21,555 of the assets delivered under the terms of the trust paper of November 23, 1857, both holding for the same object, by direction and consent of all the parties (plaintiff included) Hoppin commenced the carrying on of a manufacturing business in the Fairmount mills, investing therein in machinery and stock the aforesaid sum of money, then in his hands. This business continued until about 1861 or 1862.

On March 16, 1860, all the parties named in the declaration of trust of Mrs. Potter, of December 19, 1857, save the *cestuis que trust*, united in a revocation of said declaration, and after selling to Mrs. Mary A. Hoppin, wife of said Henry Hoppin, one-half of the premises (the Fairmount Mills) for the sum of \$4,000, declared that the other half of the premises was held by Caroline Potter and Mary A. Hoppin upon the following trusts:

To secure, 1st, Matthew Conrad Hoppin and Matthew Conrad, the two grandchildren of Matthew Conrad, deceased, the sum of \$3,354.54, one-half to each; and after that, 2d, to Matthew Conrad Potter, Matthew Conrad Wells, Matthew Conrad Hoppin, and Matthew Conrad, the four grandchildren, the sum of \$2,138.27 to each, with remainder over to uses now immaterial.

The second paper appears after the experiment to have not been satisfactory in its results, and another was executed by the same parties on January 17, 1861, in which it was stipulated that all the property should be regarded as one fund. Potter, the two Conrads, and Hoppin, were to be made a board of trustees, and the business and property carried on and managed for the interest of all concerned, with various regula-

tions, trusts, etc. This last agreement appears never to have been carried out, no property was delivered, no change took place, no board of trustees ever met, no one attempted to enforce it, and by common consent appears to have been abandoned, and matters continued as they did down to January, 1861. This last agreement may therefore be regarded as a nullity.

Matters continued in this way until the following year, 1862, when the mills having become idle and the business stopped, judgment was obtained for arrearages of ground-rents for a considerable sum. The properties were sold in September and December of that year, and Henry Hoppin became the purchaser.

The proceeds of sale were paid into court, an auditor appointed, the balance of the proceeds after payment of the incumbrances distributed, \$2,100 to Mrs. Caroline Potter for the estate of her son Matthew Conrad Potter, under her declaration of trust, and to Henry Hoppin \$3,120 for the estate of Matthew Conrad Hoppin and Matthew Conrad; and on January 25, 1863, at or about the same time, William A. Potter and Caroline his wife released to Henry Hoppin, by writing under seal, in consideration of the premises and of the sum of one dollar, all manner of action and causes of action, suits, claims, accounts, reckonings and demands whatsoever, jointly, severally, individually, and as trustee against Henry Hoppin.

On November 4, 1864, William A. Potter and William C. Conrad, as trustees under the will of Matthew Conrad, and William A. Potter and Caroline his wife, as trustees under the deeds and writings referred to, filed their bill against Henry Hoppin and George W. Conrad, charging them with a conversion of the property to their own use, as trustees under the sheriff's sale, and praying solely for an account of all the property and assets before mentioned. Answers were put in denying the equities, and after the taking of testimony from the year 1865, the cause was referred to a master in 1870, who did not receive the reference until a year after, and whose report was not filed until 1873, and the case is now (1875) before us upon exceptions to the master's report.

The speed with which the plaintiffs' cause has been pressed is certainly very little in favor of their equity, it being now over ten years since its commencement.

The case was argued before us with great ability by the very able counsel. Its determination is reached when the plaintiffs' status in the case is shown.

It is fairly inferred from the bill and confirmed by the testimony, that the plaintiffs, trustees under the will of Matthew Conrad, deceased, did not invest the moneys of the estate as directed by his will; they converted the shares or bequests to Matthew Conrad Hoppin and Matthew Conrad, to their own use in their business, and having become insolvent the whole fund was lost and the specific assets of Matthew Conrad's estate were annihilated. They were thus guilty of a breach of trust, for which they were punishable by loss of commissions, held to personally make good all losses, to be discharged as trustees, and finally to indictments under the statutes for embezzlement.

Standing in this position they assigned assets of their own, or of the firm of Potter, Conrad & Co., of which they were members, insufficient

in amount to pay for their malfeasance to the defendants, in trust, under the same terms and limitations, and for the same benefits as is directed by the will of Matthew Conrad, both as to the bequest of \$10,000 each and its accumulations, thus carrying the trust directly to the defendant. Whether the assets thus assigned be regarded as the property of the assignors as individuals, or as assets followed from their hands, into those of the defendants as assets of the estate of Matthew Conrad, deceased, as can be done in equity, their position toward them is the same. If they be regarded as assets of the individuals, the deed of assignment after delivery of the assets would be irrevocable without the consent of the *cestuis que trust*; and equity would enforce it. If, as assets of the estate of the testator, Matthew Conrad, the assignees becoming trustees *de son tort*, are accountable, not to the fraudulent trustees, but to the innocent *cestuis que trust*, whom they are bound to protect. If the *cestuis que trust*, being *sui juris*, acquiesce in the transfer, the assignees become rightful trustees, and to the extent of the assets assigned the assignees would be released. The assets assigned in this case were not sufficient at the time of the assignment to pay the bequests and the accumulations.

It has been well settled by our Supreme Court in *Pierce vs. McKeehan*, 3 W. & S. 284, that a trustee can acquire no rights to himself by breach of his trust. The assignment and transfer of assets for security of *cestuis que trust*, by the trustees guilty of a breach of trust, become, therefore, trust assets in the hands of their assignees. The tortious trustee cannot be heard in a court of equity until he makes good the estate which he has lost, and his assignee must deliver the assigned estate to the injured *cestui que trust*.

It is concisely stated in Story's Equity Jurisp., § 581, upon the authority of Sir John Leach in *Keane vs. Roberts*, 4 Maddock's Ch. R. 357, that wherever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any person affected with notice of such misapplication, then the trust will attach upon the property or proceeds in the hands of such person, whatever may have been the extent of such misapplication or conversion.

It may be regarded almost as a maxim in equity, that whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee.

In *Steele vs. Babcock*, 1 Hill (N. Y.) 527; *Boyd's Case*, 1 De Gex & Jones, 223, and numerous other cases, it has been held that if the trustee misapply the funds of the *cestui que trust*, the latter will have an election either to take the security or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original fund.

Whenever, says Judge Story, the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held in its new form liable to the rights of the original owner or *cestui que trust*.

A fortiori, if the property has been rightfully sold by an agent or trustee, if the proceeds of the sale can be distinctly traced, the property

belongs in equity, and often in law, to the principal. Such is the ruling of Lord Ellenborough, in *Taylor vs. Plumer*, 3 M. & Selw. 574, and also in *Ex parte Dumas*, 1 Atk. 232; *Thompson vs. Perkins*, 3 Mason, 232; *Burdett vs. Willett*, 2 Vernon, 638; *Grigg vs. Cocks*, 4 Simons, 438.

If a trustee, in violation of his duty, should lay out the trust money in land and take a conveyance in his own name, a court of equity would hold the *cestui que trust* to be the equitable owner, and would decree it to him accordingly, not upon any notion of his having ratified the act, but upon the mere ground of a wrongful conversion, creating in *foro conscientiae*, a trust in his favor.

In *Lewin on Trusts*, *725, it is laid down as a rule, if the alienee be a volunteer then the estate may be followed into his hands, whether he had notice of the trust or not, for though he had no actual notice the court will imply it, against him, when he paid no consideration.

This doctrine, if it required any further citation of authorities, is settled in undoubted language by the Supreme Court of the United States in *Oliver vs. Piatt*, 3 Howard, 333.

"If the trustee has invested the trust property or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which *positively and exclusively belongs to him*, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property. To the same point is *Bonsall's Appeal*, 1 Rawle 266; *Kaufman vs. Crawford*, 9 W. & S. 131; *Kirkpatrick vs. McDonald*, 1 Jones, 393. Regarding the assets in the hands of the defendant as the indirect proceeds of the estate of Matthew Conrad, deceased, and covered by the trust executed in his will, equity will hold the defendant directly accountable to the *cestui que trust* for their management and safety, and the plaintiffs could not call upon the defendants to account until they had paid in full to the *cestuis que trust* the full amount of the bequests, as well as all interest, income and increase, arising from the same.

It is not averred in the bill who is rightfully entitled to these assets, nor does it allege a payment, or an intention to pay these bequests, nor does it join the beneficiaries as parties. If these assets have yielded any increase it belongs not to the trustee but to the *cestuis que trust*. If a loss, it is the result of plaintiffs' own wrongful act, for which the *cestui que trust* can hold them responsible, and from which plaintiffs cannot ask equity to relieve them.

The evidence shows the plaintiffs to have been insolvent: that presumption not rebutted still exists. *Omnia præsumuntur contra spoliatores*. They are wrongdoers, have lost the assets of which they were trustees, come into equity with unclean hands, and as against the defendants who are the fathers of the beneficiaries, who have sought to protect the estate, who have made themselves by operation of law the real trustees; why should a chancellor be asked to decree in favor of the plaintiffs?

These *cestuis que trusts* are now *sui juris*, are entitled to the principal of the estate. They want no trustee. How can we decree an account to any one but to those legally entitled to the estate? These *cestuis que*

trusts have not called upon the plaintiffs for anything. Their silence may be taken as acquiescence in the management by the defendants of their estate, and until they complain we can make no decree which would jeopardize their interests.

Cestuis que trusts should be made parties in any case where the parties beneficially interested are entitled to be heard to dispute the right of the trustees to exercise the power under which the contract has been made or they claim to act.

Fry on Specific Performance, sec. 99; *Evans vs. Jackson*, 8 Sim. 217; *Sanders vs. Richards*, 2 Coll. C. C. 568.

These *cestuis que trusts* are entitled to bring their bill against any and all persons holding any of the assets of their estate, and even if they can trace the assets into realty they can maintain ejectment without even using the name of the trustee: *Congregation vs. Johnston*, 1 W. & S. 56; *Kennedy vs. Fury*, 1 D. 72; *Lee vs. Gibbons*, 14 S. & R. 105; *Heath vs. Erie Railway*, 8 Blatchf. 347.

That if these defendants accounted to the plaintiffs and surrendered the estate in their hands they would still be liable to the *cestuis que trust*, has been well settled in *Estate of Mary Evans*, 2 Ashmead, 470. And as to a trustee *de son tort*, I can use no stronger argument than that of Lord Chancellor Cottenham, in *Carmichael vs. Carmichael*, 2 Phillips' Rep. 105, where he says: "Another objection to what is asked is, that it would be establishing this proposition, that an executor *de son tort*, by settling with the personal representative, can discharge himself from liability to the parties beneficially interested in the testator's estate. And before I can do that I should require it to be shown that one personal representative can discharge another from responsibility to the parties beneficially interested by settling accounts with him, for an executor *de son tort* is subject to all the liabilities of an ordinary executor."

This bill prays simply for an account, and it is said that an account can do no harm, and that we can mould a decree on final hearing. That is not the law and should not be the practice.

It does not follow, that accounts are to be taken in cases where the answers disclose circumstances which show a personal liability for what is asked: *Rogers vs. Soutten*, 2 Keen, 600; *Savage vs. Lane*, 6 Hare, 36; *Campbell vs. Campbell*, 4 Halstead Ch. 743.

Where an account is decreed in equity it is equal to a judgment *quod computet* in account render, which determines all questions in bar or abatement of the proceedings. Courts of equity in analogy follow what is done at law: Story's Equity Jurisp. § 447; *O'Connor vs. Spaight*, 1 Sch. & Lefr. 309.

The answer admits accountability but not to the plaintiffs.

But it has been argued before us that under the decision in *Abbott vs. Reeves*, 13 Wright, 494, a trustee guilty of a breach of trust has a right to an account from any one holding the trust property. That case has in the facts no analogy whatever to the one now before us. There Abbott, an executor, loaned to the firm of Reeves, Buck & Co., certain assets of the estate, under an agreement that they would return them to him (they having knowledge of the trust) at a specified time, with the interest, etc., accruing on them. They did not deliver them at the time named, and the executor promptly filed his bill against them

and the holders of the securities, praying for a decree for the delivery of the specific assets. The defendants demurred to the bill, and the court held, that the plaintiff had a right to the relief prayed, and decreed a delivery in kind of the assets to the trustee. The distinction between the cases is very wide. There the executor had in fact worked no change or conversion of the assets, but asked the court to save them. Here there was a conversion by the plaintiffs themselves. There there was a simple loan, with an agreement to return at a specified time the specific assets. Here there is a deed of trust from the trustees, and substitution by them of their own assets. There it was a fraud upon the trustees. Here it is a fraud upon the *cestuis que trust*. There the defendants held under no color or right. Here they hold by virtue of plaintiff's deed.

The case does not, therefore, rule that where the trustee has parted with the assets of the estate, and thrown the trust upon other shoulders, is insolvent, and has abused his office, that he shall have equity. So in the well-known case of *Penna. Company's Appeal vs. McMurtrie*, *Legal Intelligencer*, March 6, 1874, it was a case of the virtuous trustee seeking to recover the assets of the estate wrongfully converted by the fraudulent co-trustee. Can it be pretended that the court would in that case decree an account in favor of Mr. Vezin, the fraudulent co-trustee, and surrender to him again the assets after his wrongful conversion and fraudulent conduct? My opinion is that it would not, and until it so decrees these plaintiffs can have no standing.

This court has, by act of assembly, control of trustees. We will dismiss for waste, mismanagement, fraud or breach of trusts. Can it be said that we will in equity decree in favor of those whom at law we would dismiss as unworthy of our confidence? To be consistent, we cannot. In the language of Lord Bacon, "Chancery is ordained to supply the law, not to subvert the law."

What has been said applies particularly to the plaintiffs, Potter and Conrad. What is the position of Mrs. Potter? She purchased the property of her brothers at the sheriff's sale for arrears of ground-rent, by which the mortgage in favor of these *cestuis que trusts* and herself were discharged. She received the deed, declared certain trusts, sold half the property, received the consideration, revoked the trusts and declared others; and, as appears by the report of the master, rented the property to defendant, Hoppin. I do not find, either from the report of the master or from the evidence, that any fiduciary relation existed between the defendant and her. Hoppin's trust related only to the personal assets delivered to him. She has rendered herself liable to account to those whom she created her *cestuis que trust*, which appears to have been a voluntary act, founded on the love and affection for her sister's children.

Hoppin, carrying on the business in the property, was liable to pay rent out of the trust estate controlled by him. If that has not been paid the estate is still liable, but for that this is not the case, nor is equity the remedy.

But it has been sought to charge the defendant, Hoppin, as an agent for her in the collection of certain rent of the real estate, and as such that he was bound to keep down incumbrances, and *a fortiori*, that having purchased the real estate at sheriff's sale, upon a judgment for

arrears of ground-rent, he is now trustee for her as to her half interest in said property. The finding of the master on the facts is directly against the establishing of such a theory; and I see nothing in the evidence to disturb his finding. Besides, even if there was probable ground to reverse the master's finding on this point, the evidence is conclusive that Mrs. Potter shared in the distribution of the fund raised by the sheriff's sale, was well aware of her rights in the premises, had the advice and was represented at the time by very eminent counsel, and after receipt of the money, in conjunction with her husband, executed a full release to the defendant, Hoppin, of all claims, suits, actions, demands, etc. No fraud is shown to impeach either the release or her acceptance of the money, proceeds of the realty.

A distributee of purchase-money cannot dispute the purchaser's title: *Maple vs. Kussart*, 3 P. F. Smith, 348. The release is certainly good as to her separate estate.

The master's finding upon the question, so far as it is one of fact, as to the relationship existing between Mrs. Potter and Mrs. Hoppin, will not be interfered with, unless as a plain case of error or mistake: *Izard vs. Bodine*, 1 Stockton, 309; *Sparhawk vs. Wills*, 5 Gray, 423; *Adams vs. Brown*, 7 Cushing, 222.

I am in favor of holding all persons handling trust property to the strictest accountability; but that accountability must be rendered to those directly interested in the estate, not to mere fishers for imaginary claims in the estate which they have abandoned.

The exceptions must be dismissed and report of master confirmed.

Opinion delivered by

BRIGGS, J.—Matthew Conrad bequeathed to each of his namesake grandsons: Matthew Conrad Potter, Matthew Conrad Hoppin, Matthew Conrad Wells, and Matthew Conrad, the sum of \$10,000 to be paid to them respectively as they attained the age of twenty-one. He directed his executors to invest these legacies in the meantime in good real estate securities, and to pay the accumulations from interest to the brothers and sisters of the legatees, as said legatees became of age. And appointed his sons, William C. and George W. Conrad, his son-in-law, William A. Potter, and his friend, John B. McKeever, his executors.

Instead of his executors investing the legacies in real estate securities, they suffered the money to be used by Potter, McKeever & Co.—subsequently changed to Potter, Conrad & Co.

It was soon discovered that the money was in jeopardy, and William C. Conrad and George W. Conrad, members of the last-mentioned firm, and also of the trustees, executed their bond and mortgage to all of the executors upon two mill properties at Fairmount, in the sum of \$37,232.75, to secure the several legacies of \$10,000 each, given to Matthew Conrad Hoppin and his brothers and sisters, and to Matthew Conrad and his brothers and sisters. They also gave a mortgage on the same day—May 5, 1855—and on the same mills, to Caroline Potter, a daughter of the testator, to secure \$8,000 due her from her father's estate.

The mills were subsequently sold by the sheriff upon a judgment for ground-rent, and purchased by the said Caroline Potter, pursuant to an arrangement made by the said executors and Henry Hoppin, the father

of Henry Conrad Hoppin; and on the same day, December 17, 1857, she made and delivered to them her declaration in writing, that she held the said properties under and subject: First, to secure out of and from them the said legacies respectively to Matthew Conrad Hoppin and Matthew Conrad. Secondly, in trust and for the payment and securing to be paid to same parties, trustee as aforesaid for the legatees' brothers and sisters, the accumulated interest on said legacies. And thirdly, to secure to herself \$8,000 due her with interest in her own right, then in trust for herself and Martha R., wife of William C. Conrad, in fee, with power to revoke and declare new uses. The said declaration also recited that the said mortgage had been discharged by the sale by the sheriff, and John B. McKeever had duly resigned from said trust, and the said George W. Conrad, William C. Conrad and William A. Potter, the remaining trustees, had delegated to Henry Hoppin and George W. Conrad respectively, the sole power and authority over the respective trusts each for his child—a formal assignment by them to the same effect having been made to Henry Hoppin, November 23, 1857.

The trusts declared by Caroline Potter, by deed of William A. Potter and his wife Caroline, George W. Conrad, William C. Conrad and his wife Martha R., and Henry Hoppin and his wife Mary A., dated March 16, 1860, were revoked and the following new trusts declared: To secure to the said Matthew Conrad Hoppin and Matthew Conrad, or their trustees, \$3,354.54, one-half to each; then to secure to Matthew Conrad Potter, Matthew Conrad Wells, Matthew Conrad Hoppin and Matthew Conrad, or their trustees, the further sum of \$2,128.27 each. After the payment of which sums the premises were to be held by the said Caroline Potter and Mary A. Hoppin in fee, subject to a power to revoke said trusts.

Accordingly, on the 17th day of January, 1861, the last-mentioned trusts were revoked, and it was newly declared that Henry Hoppin should be duly and legally appointed as trustee in conjunction with William A. Potter, William C. Conrad and George W. Conrad, under the will of Matthew Conrad, deceased: that all the assets, including the Fairmount mills, should be placed in the hands of all of the trustees, and that all income from same and substitutions therefor should be thrown and kept together in proper, legal and safe investments, as one general fund, for the payment of said trusts. The profits or increase from said assets were to be applied: First, to the payment of ground-rents, insurance, etc., on the property. Secondly, to the interests on the various trusts. Thirdly, \$2,000 per year to a sinking fund to secure the trust. Fourth, interest on the mortgage to Mrs. Potter and Mrs. Hoppin. Fifth, to William A. Potter for services. Sixth, the remainder equally to Mrs. Potter, Mrs. Hoppin, Mrs. William C. Conrad and George W. Conrad.

Henry Hoppin admits in his answer to the plaintiff's ninth interrogatory, that in the year 1857 William A. Potter and William C. Conrad, two of the members of the firm of Potter, Conrad & Co. (they being also trustees), placed in his and George W. Conrad's hands promissory notes amounting to \$27,983.20, on which collections were made amounting to \$27,555.18, as security for the trust for his son, and Matthew Conrad; that in February, 1858, he commenced operations at the Fair-

mount mills with the funds so received, and continued therein till September, 1862. He also admits, in answer to the plaintiff's thirteenth interrogatory, that he had on hand sufficient assets and funds to pay the ground-rents and taxes on the real estate, but declined to pay the same, and assigned as a reason that said assets and funds were not applicable to the payment of ground-rents, taxes, etc.

In consequence of neglect to pay the ground-rents, judgments were obtained therefor, and the mills sold by the sheriff, respectively on the first Monday of September and December, 1862, and were purchased by the said Henry Hoppin for the respective sums of \$8,600 and \$5,500.

The balance of this money, after the payment of ground-rents, taxes and costs, was distributed by an auditor, pursuant to the agreement of Henry Hoppin and William A. Potter, and Caroline, his wife, dated June 25, 1863, in this way: \$2,100 to William Potter, trustee, and \$3,120.28 to Henry Hoppin, trustee. On the same day William A. Potter and Caroline, his wife, by a covenant reciting said distribution, and in consideration of \$1, individually and as trustees, released all claim in the mill properties to Henry Hoppin in fee. The trustees for Matthew Conrad's estate have been duly discharged as to Matthew Conrad Wells and his brothers and sisters, and William C. Conrad and George W. Conrad have been discharged from the trust as to Matthew Conrad Hoppin. Their trust relation, however, yet remains as to Matthew Conrad and his brothers and sisters, and the brothers and sisters of Matthew Conrad Hoppin.

It is admitted that neither of the defendants has accounted to these *cestuis que trust*, or to the plaintiffs as their trustees.

It should also be stated that Henry Hoppin became dissatisfied with his position as manager of the trust as early as January 22, 1859, and desired to be relieved. He nevertheless, as admitted in his answer to the plaintiff's ninth interrogatory, continued therein until September, 1862. At this time one of the properties was sold by the sheriff, as already stated, for arrears of ground-rent, and purchased by him.

The foregoing statement is extracted from the documents executed by the parties, and the defendant's admissions.

From these facts Judge Elcock is of the opinion that the defendants are not bound to account to the plaintiffs, while I am as decided in judgment that they should. The learned president of the court having been of counsel in the case, did not sit at the argument, and hence, the exceptions to the master's report must fall from a division of the court.

Why should not the defendants account to these very plaintiffs? They are, with the exception of Caroline Potter, the trustees appointed by Matthew Conrad. Two of the plaintiffs, William A. Potter and William C. Conrad, instead of investing the money as required by Matthew Conrad's will, used it in their business, and when it became in jeopardy, to secure it, William C. Conrad and George W. Conrad gave their bond and mortgage on the Fairmount mills to all of Matthew Conrad's trustees to secure the trust legacies to their respective children. While they did wrong in misappropriating the money, they did right afterwards in their efforts to secure it. Surely this mortgage became an asset of Conrad's estate in the hands of his trustees. It was put there ex-

pressly for that purpose. When the mills were purchased by Caroline Potter, pursuant to an arrangement with the trustees and Henry Hoppin, and she gave her written declaration to them as trustees, and to the said Henry Hoppin, the mills became an asset in the nature of a pledge as security in lieu of the mortgage discharged by the sheriff's sale. When Henry Hoppin took possession of the mills, in February, 1858, he did so by an arrangement with and authority from the trustees, to manage them as their agent; and the balance-sheets rendered by him to them so expressly state. He is now in direct relation with them both by contract and the possession of the property which they held in trust. So he remained when he joined in the covenant of January 17, 1861. That he viewed his relation in this light is obvious from the balance-sheets he rendered to the trustees. Every letter which passed between him and the trustees is consistent only with such relation. Let the letters speak for themselves:

"PHILADELPHIA, August 28, 1860.

"To W. A. POTTER, W. C. CONRAD, G. W. CONRAD,

"Trustees for M. C. Hoppin:

"GENTS:—I have to inform you that I hereby decline to have anything more to do with the account of my son, and call upon you to at once take charge of the same and place it in a satisfactory position. I also take this occasion to inform you that I no longer act in the capacity relative to the business of the mills that I have for the last three years. I claim to have been entitled to my living during the time, which I have drawn out. The balance remaining, of all kinds, consisting of notes unpaid, book-debts, dye-wood, dye liquors, etc., belonging to that account, is at your disposal, to do with as you please, first having settled my son's account satisfactory to yourselves, and a third party whom I will name.

"Respectfully yours,

"H. HOPPIN."

Test again his understanding by his letter of June 16, 1861:

"W. C. CONRAD, GEORGE W. CONRAD, W. A. POTTER, *Trustees:*

"GENTS: I enclose you a synopsis of H. H.'s affairs, from the time he assumed the unfortunate position he has been forced to occupy for the last four years. And I now have to inform you that after having settled from the assets (which I shall at once proceed to do) now in my hands the obligation, in my opinion, I am personally responsible for, I shall, on the 15th of July, 1861, stand prepared to pass over to you, as trustees for certain parties, or to your authorized representatives, all the remaining assets, together with the possession of the Fairmount mills, trust deed, etc., which may remain in my possession at that time.

"Respectfully yours,

"H. HOPPIN."

Observe he addresses them as "*Trustees for M. C. Hoppin,*" not as members of the firm of Potter, Conrad & Co. He acknowledges he has been managing the trust for his son, and calls upon them at once to take charge of the same, and tenders to them the remaining assets in his hands, with the Fairmount mills, which he admits he has been managing for the trust for the last four years.

Every deed and covenant made, every balance sheet he rendered, every letter he wrote, admits his relation to the trustees of Matthew Conrad's legatees in the plainest possible way; and yet it is seriously contended he is not bound to account to them for the property he received from them and the members of the firm of Potter, Conrad & Co., under arrangements with the trustees to secure trust funds.

It is true he received the \$21,555.18 from the assets of William A. Potter and William C. Conrad, of the firm of Potter, Conrad & Co. But these gentlemen were also trustees, and those assets were substituted in the trust for the trust moneys they had used—limited, it is true, when substituted to the payment of the legacies of Matthew Conrad Hoppin and Matthew Conrad, yet fastened to trust for that purpose, and made general by the covenant of January 17, 1861.

Nor does the fact that the defendants might have been called to an account by the *cestuis que trust* relieve them. The answer is, they have not been, and the *cestuis que trust* are not bound by arrangements to which they are not parties, though made by their trustees, and may have direct recourse against their trustees, notwithstanding, for neglect of duty. The moment the defendants ask to be relieved from accounting to plaintiffs, because liable to their *cestuis que trust*, they are met with the command: "pay them and you will be relieved; it is the fact of payment, and not liability, that relieves you. Your agreement without performance is but accord without satisfaction. It is your non-performance of your agreements and covenants with the plaintiffs which constitutes the breach that renders you liable to them."

As soon as Hoppin purchased the mills he began depleting them of their machinery, and realized from this source alone more than sufficient to pay the balance due the trust. But for any income from the mills he refuses to account to any one, alleging that he is entitled to hold the mills and their earnings in his own right.

Shall he be allowed to do this so long as trust moneys, which they were to secure, remain unpaid? He purchased at the sale for arrears of ground-rent, accruing during his management of the mills for the trust, and which ground-rent he refused to pay, though, as he admits in his answer to the plaintiffs' thirteenth interrogatory, he had sufficient trust funds in his hands with which to pay it. Shall he be allowed to hold the trust property, protected confessedly only by a title procured by his own neglect of duty! He had paid the ground-rent theretofore, and why not this, also? To do so was his duty by an express provision of the covenant of January 17, 1861. Independent of this, the law cast upon him such duty the moment he assumed the management of the trust, so long as he had funds with which to do it.

In *Chorpenning's Appeal*, 8 Casey, 315, the court said: "The doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, when he stands in a fiduciary relation to it, if contested by a party entitled to it as *cestui que trust*, is indisputable. And the rule is inflexible without regard to the consideration paid on the honesty of intent. Public policy requires this, not only as a shield to the parties represented, but as a guard against temptation on the part of the representative."

This general doctrine is qualified to this extent: that where the sale

is adverse to the interest of the *cestui que trust*, and the trustee has no money in his hands, or in expectation with which to prevent the sale, he may purchase and hold in his own right. Such is the doctrine of the case just cited. The purchase there was sustained because there was no evidence that the guardian "had funds in his hands wherewith to save the property from sale, or to buy it for their benefit." "If," continues the court, "such had been the case, and he had withheld it—let the land go to sale and bought it himself—he might have, by this means, been required to account. A trustee is bound to fidelity to the interest of the trust, and will not be permitted to make profit by means of his relation. If he has the power and means, duty requires him to act for the benefit of the trust." The same doctrine is affirmed in *Parshall's Appeal*, 15 P. F. Smith, 224, and the administrator was required to account.

It was, therefore, the plain duty of Hoppin either to pay the ground-rent, and thus prevent the sale, or to account with the plaintiffs and pay them the money that they might have done so. And having neglected to do this, his purchase leaves him just where he was before the sale—still an agent.

Nor does the fact that the plaintiffs were nominally parties to the several deeds and covenants mentioned break the force of this conclusion, as the defendants knew they were dealing with property owned by the plaintiffs' *cestuis que trust*. Moreover, all that was done was to protect the trust, and not again to expose it to hazard. In such case the law mercilessly strikes down every impediment interposed to prevent a recovery in right of the *cestui que trust*: *Abbott vs. Reeves, Buck & Co.*, 13 Wright, 494; wherein our Supreme Court adopt the language of the court in *Fuller vs. Knight*, 6 Beav. 205: "The question really comes to this: whether the trustee has done, or could do, or would be allowed by this court to do, any act which would fetter his power of doing his duty. His first obligation was to perform the trust. He had concurred in committing a breach of trust, and the instant he found he had done so, was it not his duty to repair it? And could he be permitted in violation of his duty to do an act for his personal benefit, by which he deprived himself of the power of performing his duty?" The same doctrine is maintained in *Purdy vs. Powers*, 6 B. 492, and in *The Pennsylvania Co. vs. McMurtrie*, 31 Legal Intel. 76.

Nor do I think the release made and delivered by William A. Potter and his wife Caroline, in itself, estops Mrs. Potter from demanding an account, as the consideration for giving it was the distribution of the purchase-money for the mills to the *cestuis que trust*. The law always looks with jealousy upon such arrangements when set up to bar a recovery by a *cestui que trust* from a trustee who had not accounted when such arrangements were made; and nothing short of evidence that Hoppin at the time unreservedly and fully disclosed to Mrs. Potter the extent of his own knowledge should sustain the release in any event. She was a married woman, and not presumed to be familiar with the management of Hoppin, except as shown by affirmative evidence he disclosed to her his knowledge of the management: *Parshall's Appeal*, 15 P. F. Smith, 224; *Wistar's Appeal*, 4 P. F. Smith, 60; *Campbell vs. McLain*, 1 P. F. Smith, 200.

Nor is the complexity growing out of the various relations which Mrs.

Potter, Henry Hoppin, and Potter, Conrad & Co., now occupy to the property thus pledged to secure the trust, a reason for the defendants not accounting to the plaintiffs in this proceeding. These relations became grafted to the trust in an effort to bring back the perverted moneys, and may now be regarded as so many branches diverging from the same trunk, but so interwoven that they can be better considered together than each by itself; and a court of equity is so flexible in its nature as to extend its reach and lay its grasp upon the equities, wherever they are, and hold them up to the chancellor that he may so mould his decree as to protect them all.

It will be seen that I reach a conclusion adverse to that of the master. He reports that Hoppin was but a tenant, when, in fact, there is not a syllable in the reported evidence of such a relation; and Hoppin's answer and admissions, and all the documents in evidence, are against such conclusion.

He reports also that Hoppin had no funds in hand to pay the ground-rent when the mills were sold; whereas, Hoppin, in his answer to the plaintiffs' thirteenth interrogatory, says he had. Also, that the covenant of January 17, 1861, was considered as inoperative. It was, nevertheless, solemnly executed, and I fail to see any evidence whatever that any one, except Hoppin himself, refused to conform to it. His letter of June 16, 1861, is a flat refusal to do anything thenceforth to make effectual any of the covenants.

The master has assumed that the several deeds and covenants referred to estop the plaintiffs' right to proceed further in right of the *cestuis que trust*; whereas, I regard them as but so many efforts to protect the trust, and failing to accomplish that result, they fail to accomplish any result as affecting the trust adversely.

The result, however, is, that Henry Hoppin has received large sums of money, in which he had no personal interest, to secure certain trusts. That the evidence is positive that those trusts have not been paid; that there is no evidence that Mrs. Potter has been paid her money; that the assets traced to his hands are superabundantly sufficient to pay every dollar of the balance due the trust. Yet Henry Hoppin is permitted to retain these without accounting, and let the *cestuis que trust* recover of the derelict trustees, or get their money as best they can. Such a result, to my mind, is unjust, inequitable and unwarrantable. Nevertheless, the exceptions to the master's report are dismissed, and the report confirmed by a division of the court.

Exceptions dismissed and report of master confirmed.

J. Howard Gendell and Clement B. Penrose, Esqs., for plaintiffs.

John B. Thayer and John G. Johnson, Esqs., for defendants.

[Leg. Int., Vol. 32, p. 90.]

THOMAS vs. PAINTER.

Where the facts have been stated honestly, fairly, fully and without reservation to an alderman, and he advises defendant to proceed and make the arrest, the defendant cannot afterwards be successfully sued for malicious prosecution.
Rosenstein vs. Feigel, 6 Philada. Rep. 532, followed and approved.

Motion for a rule for a new trial. Opinion delivered March 6, 1875, by

BRIGGS, J.—The jury were instructed: "Before you can render a verdict for the plaintiff, you should be satisfied from the testimony that there was no probable cause for making this arrest, and that the defendant was actuated by malice in causing the arrest. Unless both of these propositions have been established by the evidence, you should render a verdict for the defendant—one will not suffice.

"Probable cause may be defined to be the existence, or apparent existence, of such facts and circumstances as would cause a man of ordinary caution and prudence to believe them to be true, and to act upon them.

"If you find from the evidence before you that the facts and surrounding in this case were of that character, then the defendant was justified in making the arrest, and if justified in law, cannot be held answerable by the law for thus acting, notwithstanding the injury done to the plaintiff."

The plaintiff's counsel thinks this was submitting what constitutes probable cause to the jury. We do not think so. Probable cause was expressly defined by the court, and the jury instructed: "If you find from the evidence before you," etc., "then the defendant was justified in making the arrest."

This clearly submitted to them only the ascertainment of the facts, and required them, as they found them, to apply the law as given by the court in the definition accordingly.

It is also alleged that there was error in the instruction: "If the defendant honestly, fairly and fully, and without reservation, stated the facts of the case as he knew them, and understood them, to the alderman, for the purpose of learning what he should do, and not as a mere color or pretext for getting the warrant, and the alderman advised him to make the arrest, and the defendant honestly and in good faith acted upon the advice in making the arrest, he is to be protected."

This instruction is in accordance with the doctrine of *Rosenstein vs. Feigel*, 6 Philada. Rep. 532. That case was decided in 1868, and has maintained its ground, and been recognized by the bar of this city, and the court that rendered it, since then. To say nothing of the respect due the court that made it, a bar so learned and critical as ours would scarcely have suffered it to remain without question so long had they doubted the soundness of its principle. And much may be said in maintenance of such doctrine. An alderman is an officer of constitutional creation, invested with great power in bringing offenders to justice, is a conservator of the peace, and specially commissioned to inquire into all charges of an alleged criminal nature, and when the evidence shows a probable cause of guilt, to send the party to the Court of Quarter Sessions for trial. The prosecutor must invoke the agency of the alderman, or let the culprit go. He can obtain an investigation in no other way. Will, then, the law, after pointing out to the citizen the only official who can make the investigation, repudiate his judgment upon facts honestly laid before him, and hold the prosecutor answerable for the official's mistake? "To so decide," as is said in *Laughlin vs. Clawson*, 3 C. 330, "is to use the machinery of government as a trap to ensnare those who trust in government for such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government

itself, and government cannot allow the citizen to suffer for his proper trust in its proper functionaries." It is true, in that case it was the district attorney who was consulted, yet the reasoning of the court is as applicable to any other functionary, especially when the question submitted, as in this case, was one of fact and not of law. The question from the facts submitted to the alderman here was: "Was there reasonable cause to believe Mrs. Thomas implicated in the fraud?" A layman of calm and cautious judgment could as well, perhaps better than a lawyer, answer this. And just this question even a judge must submit to laymen in the capacity of jurors, in the last resort, for their determination; and if they determine it affirmatively, it protects the defendant. This is so because the law says it shall be so. Yet the mandate which requires the citizen to invoke the agency of our minor magistrates in the first instance is not less imperative, and should, it seems to us, be as effectual under similar circumstances.

Discovering no error in the proceedings at the trial, the rule for a new trial is refused.

Rule refused.

[Leg. Int., Vol. 32, p. 90.]

FAUNCE TO USE *vs.* SUBERS *et al.*

Presumption of service.

In taking a judgment for want of an appearance on a return of two *nihil* on a *sci. fa. sur* mortgage, the fourteen days must be calculated from the return day of the writ, and not from the *teste* of the writ.

Practice.

An *alias sci. fa. sur* mortgage issued January 29, 1875, to first Monday in February, 1875, and was entered "*nihil habet*." Judgment was taken February 12, 1875, for want of an appearance upon two returns of "*nihil habet*" (the original *sci. fa.* having also been so returned).

Execution issued and property was advertised by the sheriff.

Rule taken to strike off judgment and set aside *levari facias*.

Krumbhaar, for rule.

Argued that the entry of judgment under two returns of *nihil habet* obtained from an old established practice and not from statute.

That two returns of "*nihil habet*" were equivalent to a service; therefore, service must be presumed to have been made when the second return is made, which is upon the return day.

That fourteen days must then be allowed defendant to appear, which, if he does not do, judgment may be taken against him, therefore, judgment in above case was premature, eleven days only having elapsed.

That to reckon from the *teste* of writ would be too indefinite.

Chambers vs. Carson, 2 Wh. 9 and 372; *Warder vs. Tainter*, 4 Watts, 270.

Cantrell, contra.

Argued that the fourteen days should run from date of writ, and cited: Act 1th June, 1836, sections 16 and 17, 1 Purd. 44 and 45; *Laws vs. McDanel*, 1 Penna. L. J. R. 421.

The court said this was a very important question of practice, which seemed to be in an unsettled state, but thought the objection well taken.

That the two returns of *nihil habet* were equivalent to a service, and in such cases, unless some particular day was established upon which service should be presumed to have been made, it still left the question open.

That the *teste* of the writ was not the proper day, because the writ might have issued many days before return day, and if judgment was entitled to be taken at the expiration of fourteen days thereafter, it apparently might be entered, even before the writ was returned; therefore, to settle the practice, the court decided that the return day is the proper day to count from.

Rule absolute.

[Leg. Int., Vol. 32, p. 98.]

MORGAN et al. vs. TENER et al.

Where defendants undertake merely to *forward* a claim for collection they can only be held liable for fraud or concealment, and the statute of limitations will be a bar to an action against them.

Rule to take off nonsuit. Opinion delivered *March 13, 1875*, by

BRIGGS, J.—That a great fraud has been done to the plaintiffs cannot well be denied.

But there is no evidence whatever before us to show that the defendants are in any way implicated in the fraud; and the learned counsel for the plaintiffs, both at the trial, and during the argument here, disclaim such imputation, and base their right of recovery in the plaintiffs' behalf upon the defendants' undertaking to collect the money due to plaintiffs by Tilghman Nuttle, who resided in Carolina county, Maryland.

This, then, raises the question, the plaintiffs and defendants being alike innocent, which should bear the loss?

The defendants' undertaking is to be found in this receipt, which they delivered to the plaintiffs in September, 1857:

"Received of Messrs. Morgan and Stedpole, the claims below described, to be forwarded by us for collection, by suit or otherwise, at our discretion."

Then follows a description of the notes against Tilghman Nuttle. This receipt shows an undertaking by the defendants not to collect themselves, but to transmit to another for collection. This part of the undertaking they performed by duly sending the claims to George W. Russum, an attorney-at-law, at Denton, Maryland. He caused the suit to be brought, and judgment was obtained against Nuttle, April 5, 1859. This judgment Russum had satisfied on the 28th of September of the same year, without knowledge of the plaintiffs or defendants, and without having transmitted to either of them a cent. There is no evidence that the plaintiffs or defendants knew of the satisfaction of this judgment until 1869, ten years thereafter.

The present suit was brought to September term, 1869, to which the defendants pleaded the statute of limitations. And the question now is, does the statute bar the claim?

All of the authorities show that the statute begins to run at the time the defendant becomes liable to answer or pay: *Campbell's Administrators vs. Boggs*, 12 Wr. 524; *Rhines's Administrators vs. Evans*, 16 P. F. Smith, 192.

That time was, viewed most favorably for the plaintiffs, on the 28th day of September, 1859, when Russum had the judgment satisfied. And unless the defendants have done something to stop the running of the statute it effectually bars the plaintiffs' right of recovery. But the plaintiffs allege that the defendants took the case out of the statute by reporting to the plaintiffs, responsive to their inquiries, that the judgment was "uncollectable." While such reply would be unanswerable, had the defendants undertaken to collect, as was done in *Bradstreet vs. Everson*, 22 P. F. Smith, 127, it has not such force or effect where the obligation is to forward for collection.

This relation clearly indicated to the plaintiffs that the defendants were not themselves to collect, and in the absence of negligence on their part in the selection of Russum, or that they knew the answer that the judgment was uncollectable, was untrue, they should not be made liable for merely reporting to the plaintiffs what Russum communicated to them. To hold more than this would convert the defendants from forwarders into insurers. This can in no sense be inferred from an undertaking to forward, and to report information received. That nothing short of fraud or concealment, in such a case as this, will arrest the running of the statute, is obvious from the cases already cited. Nor does the fact that the defendants did not impart to the plaintiffs the name of Russum, weaken the defendants' position. The plaintiffs could, at any moment, have ascertained it by asking, and the fact that they did not ask, shows their confidence in whomever he might be, or indifference as to who he was.

The evidence shows that the information communicated by Russum, deceived both the defendants and the plaintiffs. In such case the loss must be borne by the one on whom it falls. The same view is aptly and elegantly expressed by Mr. Justice Sharswood, at the conclusion of his opinion in *Grubb vs. Cottrell*, 12 P. F. Smith, 28, wherein he says: "It is well settled that if a loss must fall upon one of two innocent persons, both parties being free from blame, and justice being thus in equilibrium, the maxim *melior est conditio defendentis*, rules the case."

From this, it follows, that the judgment of nonsuit was properly entered, and the rule to take it off must be discharged.

Rule discharged.

Charles E. Morgan, Jr., and Robert H. McGrath, Esqs., for plaintiffs.
Gustavus Remak, Esq., for defendants.

[Leg. Int., Vol. 32, p. 107.]

MEYER vs. BASSON.

The treaty of December 11, 1871, between the United States and the German empire, containing provisions which give to the consuls of the respective governments exclusive cognizance of differences of every kind arising between the captains and crews of vessels belonging to the respective countries, and enacting that the local tribunals shall not, on any pretext, interfere in these differences, it was *held*, that a sailor, who was a Hollander, who had shipped at Liverpool as a seaman, on board of a German ship, and who, upon the arrival of the ship in this port, had been arrested and handed over to the German consul upon a requisition made by him on a complaint preferred to him by the captain of the ship, could not maintain an action in this court against the captain for such arrest.

Rule to show cause why a new trial should not be granted. Opinion delivered March 20, 1875, by

THAYER, P. J.—The facts of this case, as they appeared in evidence at the trial, were, that the plaintiff, a Hollander, shipped at Liverpool as a sailor on board the German ship “Elena,” bound thence on a voyage to the United States, and back again to Europe. The defendant, Victor Basson, was the master of the ship. The “Elena” sailed from Liverpool on the 22d of July, 1873, and arrived at Philadelphia September 17. On the following day the master of the ship, having appeared before the consul of the German empire at this port, and having made a complaint to him against the plaintiff, of insubordination and desertion, the consul, acting under the provisions of the treaty of December 11, 1871, between the German empire and the United States, made a requisition upon a United States commissioner for his arrest and detention. The plaintiff being brought before a commissioner, the master of the ship appeared and charged the plaintiff with insubordination and desertion, declaring that he had shipped as a sailor on board the “Elena,” under the name of Jan Umlend, and that his name, as such, was borne on the ship’s articles.

The plaintiff did not deny that he had shipped as a sailor on board the “Elena,” at Liverpool, and had made the voyage to Philadelphia in that capacity; but he denied that his name was Jan Umlend, or that he had signed the ship’s articles, or that he was bound to make the return voyage to Europe. The commissioner committed him under the provisions of the 13th and 14th articles of the treaty, to be detained during the stay of the vessel in this port, and to be at the disposal and expense of the consul of the German empire. On the 23d of September, the plaintiff sued out a writ of *habeas corpus* before the judge of the District Court of the United States. On the 26th of September, the German consul, Mr. Charles H. Meyer, sent a note to the marshal of the United States, requesting him to discharge the plaintiff from custody and to instruct him to call at once at his office. Whereupon the marshal discharged him from custody, and made return accordingly to the writ of *habeas corpus*. The plaintiff then commenced this action against the master of the ship, had him arrested upon a *capias*, and the German consul gave bail for him.

On the trial the treaty was put in evidence by the defendant’s counsel, and also the laws of Germany, regulating the contracts and obligations of sailors on board German ships.

By the latter it appeared that sailors who ship on board German ships are bound for the whole voyage, whether they sign the ship's articles or not.

The articles of the treaty, which are pertinent to the case, are as follows :

"ARTICLE XIII.—Consuls-general, consuls, vice-consuls or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nations, and shall have the exclusive power to take cognizance of, and to determine, *differences of any kind* which may arise, either at sea or in port, between the captains, officers and crews, and especially in reference to wages, and the execution of mutual contracts. *Neither any court nor authority shall, on any pretext, interfere in these differences*, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or when persons other than the officers and crew of the vessel are parties to the disturbance. Except as aforesaid, the local authorities shall confine themselves to the rendering of efficient aid to the consuls when they may ask it, in order to arrest and hold all persons whose names are borne on the ship's articles, and whom they may deem it necessary to detain. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authorities, and supported by an official extract from the register of the ship, or the list of the crew, and shall be held, during the whole time of their stay in port, at the disposal of the consuls. Their release shall be granted only at the request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

"ARTICLE XIV.—Consuls-general, consuls, vice-consuls or consular agents, may arrest the officers, sailors, and all other persons making part of the crews of ships of war or merchant vessels of their nation who may be guilty, *or be accused*, of having deserted said ships and vessels, for the purpose of sending them on board or back to their country.

"To this end the consuls of Germany in the United States shall apply to either the federal, State, or municipal courts or authorities; and the consuls of the United States in Germany shall apply to any of the competent authorities, and make a request, in writing, for the deserters, supporting it by an official extract of the register of the vessel and the list of the crew, or by other official documents to show that the men whom they claim belong to said crew. Upon such request alone thus supported, and without the exaction of any oath from the consuls, the deserters (not being citizens of the country where the demand is made, either at the time of their shipping or of their arrival in port) shall be given up to the consuls. All aid and protection shall be furnished them for the pursuit, seizure, and arrest of the deserters, who shall be taken to the prisons of the country, and there detained, at the request and at the expense of the consuls, until the said consuls may find an opportunity of sending them away.

"If, however, such opportunity shall not present itself within the space of three months, counting from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause."

On the trial the jury were instructed that the evidence showed that the ship was a German ship, that a difference had arisen between the captain and the plaintiff, who was one of his crew, and of that difference the consul, by the express words of the treaty, had exclusive cognizance; that the local authorities were precluded by the treaty from interfering in their differences, except to aid the consul in the discharge of his duties. That the consul was empowered by the treaty to cause the arrest of sailors coming hither on German ships, upon charges made against them by the masters of such ships, and that the truth or falsity of these charges could not be tried by an American court, but were, by the express terms of the treaty, relegated to the tribunals of Germany, and that the captains of German vessels could not be made answerable by actions in our courts for such charges against sailors who belonged to their crews. If the jury, therefore, should find that the plaintiff, not being an American citizen, but a Hollander, had shipped in Liverpool, as a sailor on board the "Elena," and that upon his arrival at this port, without being discharged by the master, he was arrested and detained upon the consul's requisition, upon charges of insubordination and desertion made against him by the master, the master was not responsible in an action here for those charges, and they ought to find a verdict for the defendant.

Upon the argument of the present rule, it was strenuously insisted by the plaintiff's counsel that inasmuch as the plaintiff denied that his name was Jan Umlend, and also denied that he had signed the ship's articles, it ought to have been left to the jury to determine whether his contract of service as a sailor on board the "Elena" had not terminated upon his arrival in this port. The plaintiff himself testified that he had shipped at Liverpool as a sailor on board this ship, and that he came hither in her as such. He alleged that he had not signed the articles, and that consequently upon his arrival here his engagement was ended. The captain, on the other hand, alleged that his name was Jan Umlend, that he was known by that name on the ship's articles, and that, with the other sailors, he was bound for the return voyage. What the plaintiff's real name was is a matter of very little consequence, although much was attempted to be made out of that point upon the argument. The real point of the case was, that he was a member of the crew, and was therefore subject to the provisions of the treaty. The captain alleged that he had signed the articles under the name of Jan Umlend. The plaintiff denied it, and claimed his discharge solely upon the ground that he had not. The captain insisted that he had, and refused to discharge him. Now, this was a "difference" between the captain and the sailor, in the sense in which this word is used in the treaty, and precisely one of those differences which it was the exclusive province of the consul to determine, and which by the very words of the treaty, are withdrawn from the jurisdiction of the courts or authorities of this country. The language of the treaty is, "differences of every kind which may arise either at sea or in port, and *especially* in reference to wages, and the *execution of mutual contracts*."—Art. XIII. It is impossible to read this treaty and to believe that the high contracting powers intended to leave to the local tribunals of the country in which their ships happened for the time to be moored, the decision of questions arising between the master and sailors of those ships, in regard to the construction or

termination of the shipping contracts made between the sailors and the vessels. By Art. XIV. consuls are empowered to arrest "sailors who may be guilty *or accused* of having deserted said ships, for the purpose of sending them on board or back to their country," and the authorities of the respective countries are required to aid the consuls in doing this. The language of the treaty is very strong, "who may be guilty *or be accused* of having deserted," showing conclusively that the decision of this question is withdrawn from the foreign tribunals, and is to belong exclusively to the tribunals of the country to which the ship belongs, and it is expressly agreed between the powers that "*neither any court nor authority shall, on any pretext, interfere in these differences.*" Under this treaty, American ships in German ports are, for all purposes affecting the internal order of those ships, and the rights and relations of their officers and crews, American territory, and German ships in American ports are German territory, and neither can be subject to the laws or tribunals of the other. "Neither any court nor authority shall, on any pretext, interfere in these differences." American citizens on German ships and German citizens on American ships are, it will be observed, by the wise forecast of the treaty-makers, carefully excluded from these provisions of the treaty. There can be no just ground of complaint, surely, that German citizens shall be tried by German laws and German tribunals, and American citizens by American laws and American tribunals. And as to those of other nationalities, neither have they any reason to complain that they are remitted to the tribunals of the country under whose flag they have consented to serve. If German ship-masters in American ports, and American ship-masters in German ports, are to be subject to capias and actions, and damages to be assessed by the tribunals of a foreign country, for complaints of insubordination or desertion made against their crews, to their respective consuls, of what avail is the treaty, and of what value are the privileges and immunities which it secures to the commerce of each of these countries? Whether the voyage for which the plaintiff shipped had ended or not, being a matter in dispute between the plaintiff and the master—in the language of the treaty, a "difference" between them, was as much a matter to be decided by a German tribunal, as the question, whether he had been guilty of insubordination and mutiny. Both were, under the treaty, cognizable only by the German authorities. The position contended for by the plaintiff's counsel would altogether destroy the efficacy of the treaty, and practically abrogate its provisions, for if the local tribunals are to assume jurisdiction of these disputes, merely because the sailor when his ship arrives in this port declares that his contract is ended, it is plain that they will be called upon to assume jurisdiction of every such dispute, for he has only to say this, and then, according to the argument, the local jurisdiction takes effect, and the treaty might as well be a piece of blank paper. If the plaintiff has been injured, the German courts are open to him, but ours are fast closed and barred by the treaty. Let him settle his differences in the courts of the country under whose flag he sailed, and to whose authority he voluntarily subjected himself. It is impossible to maintain that the obligations of this treaty are observed if the courts of this country are to decide questions which, by the treaty, are expressly remitted to the tribunals of the other

contracting party, and it is equally impossible to say that the rights and immunities which are guaranteed by this treaty to the masters of German ships in American ports, are enforced, within the meaning of the treaty, if their exercise of those rights in the manner and by the very channels of authority specified in the treaty is to subject them to arrest and trial in the courts of this country. Few ship-masters will venture to claim their rights under the treaty, or to ask their consuls to have its provisions enforced, if they are to do so at such a price. In this very case the master was arrested, and the voyage might have been broken up if the consul had not entered bail for him. By Art. VI. of the Constitution of the United States, treaties made under the authority of the United States, are a part of the supreme law of the land. They are contracts of the highest obligation, and are to be enforced in such manner as to carry out the plain intention of the parties and to accomplish the end for which they were made. The evident purpose of this treaty was to exclude the intervention of the local authorities in every shape and manner from all interference in the disputes arising between the sailors and officers of American ships in German waters, and those of German ships in American waters. That purpose will be altogether frustrated if the parties to these disputes are to be harassed by civil actions against them while in a foreign port, for matters which constitute an essential part of the dispute itself. Of what avail will it be for the consul to decide the dispute if it is to be reopened and tried by an action in the local tribunals? Or, how will such a course of conduct comport with the language of the treaty, "no court or authority shall, on any pretext, interfere in these differences?" To have permitted the jury in this case to decide whether the voyage for which the plaintiff shipped was ended, would have been to permit them to decide the very point of the dispute between him and the captain and so to assume a jurisdiction which is expressly excluded by the treaty. We do not see that the case is altered or that the prohibition of the treaty can be avoided by changing the form of the proceeding and by transforming the party from a defendant into a plaintiff. But it is argued that because the consul finally concluded to allow the plaintiff to depart, and in answer to the writ of habeas corpus, permitted him to go his way, that, therefore, the "difference" between the captain and the plaintiff is now to be determined by a jury in this court. We cannot see that such a result legitimately follows from the action of the consul in permitting the plaintiff to go at large in preference to assuming the trouble and expense of sending him back to Germany for trial. The rights and immunities of the captain, under the treaty, cannot be in the least degree impaired or diminished by that circumstance, for it was one over which he had no control whatever. There would be more plausibility in the argument if the consul had decided the dispute in favor of the present plaintiff. But he did no such thing. On the contrary, when examined as a witness in this case, he insisted that he had, in the discharge of his duties, lawfully arrested the plaintiff for mutiny and desertion, and maintained that he had been guilty of those acts. What the consul did in response to the habeas corpus was simply to release his hold upon the plaintiff, and permit him to go at large. That act could not, in our opinion, deprive the captain of any right to which he was entitled under the treaty, and one of those

rights clearly is, that the difference which arose between himself and the plaintiff on board of his own ship, while in this port, and which difference turns mainly upon the construction of a contract for seaman's service on board of a German ship, shall not be determined by the tribunals of this country, either in a direct or indirect proceeding brought for that purpose, but by those of his own country. Rule discharged.

George P. Rich and J. Warren Coulston, Esqs., for plaintiff.

James Parsons, Esq., for defendant.

[Leg. Int., Vol. 32, p. 116.]

COMMONWEALTH *ex rel.* JEANETTE GREGAR BOOTH *vs.* GIDEON CLARK, REGISTER OF WILLS.

Registers' courts having been abolished and "all their powers and jurisdiction" having been transferred to the Orphans' Court by Article V., section 22, of the Constitution, it is the duty of the register when any "disputable or difficult matter" arises before him in the probate of a will, upon the request of either party, to transmit the proceedings to the Orphans' Court for adjudication, and this duty is enforceable by mandamus. The right to remove the proceedings in such case given by the 25th section of the act of 1832, is not taken away by the new Constitution, but the Orphans' Court is substituted in the place of the register's court.

Motion for a mandamus. Opinion delivered *March 20, 1875*, by

THAYER, P. J.—It appears by the petition of the relator that she is the daughter of the late Elizabeth Gregar (or Elizabeth Burns), who died December 11, 1874; that immediately after the death of her mother, the relator entered a caveat in the register's office against the admission to probate of any paper which might be offered purporting to be the last will of said Elizabeth; that on the 16th December, 1874, a paper writing was offered to the register for probate purporting to be the last will of said Elizabeth, dated November 30, 1874, and that thereupon the parties to the controversy proceeded to take testimony before the register, in support of and against the admission to probate of said writing; that on the 5th February, 1875, while the examination of witnesses was proceeding before the register, a question bearing upon the matter in controversy was propounded by the relator's counsel to a witness produced by them, which, upon objection being made, the register ruled out. The relator then, under the 25th section of the act of March 15, 1832, presented a request in writing to the register, requesting him to certify "the disputable and difficult matter" to the Orphans' Court of this county. Other proof was then offered to the register by the relator's counsel, which he refused to receive. Whereupon the relator renewed her request that the register would certify the matter to the Orphans' Court, and at the same time requested him to issue his precept to the Court of Common Pleas to try the questions of fact which she had raised, viz., whether the said Elizabeth was of sound and disposing mind and memory at the time of making the paper writing alleged to be her last will, and whether the said paper was obtained by fraud, imposition and undue influence, the latter allegation being sustained by an affidavit made by the relator at the time of entering her caveat.

The register has not complied with either request, and on the 20th February, 1875, he formally refused to certify the matter to the Orphans' Court.

Under the decision of the Supreme Court in *Commonwealth ex rel. Robinson vs. Clark* (January 25, 1875, *Legal Gazette*, February 5, 1875), it was in the discretion of the register to comply with either of the two requests made by the relator. Had he chosen to issue his precept to the Common Pleas, compliance with the other request would have been unnecessary. But he has complied with neither request. In this position of affairs, there can be no doubt whatever that under the law as it existed before the adoption of the new Constitution, it would have been the duty of the register upon the request of the relator, to have appointed a register's court for the decision of the matter in dispute between the parties, a duty which this court would have compelled him to perform by a writ of mandamus; for the 25th section of the act of March 15, 1832, is mandatory and admits of no discretion in the register to grant or refuse a register's court under such circumstances. It is a right secured by law which the register cannot lawfully refuse, and which is in no manner dependent upon his discretion: *Commonwealth ex rel. Winpenny vs. Bunn*, 21 P. F. S. 405. But by the new Constitution, Art. V., section 22, registers' courts are abolished and "all their powers and jurisdiction" are transferred to the Orphans' Court.

What then becomes of the provision contained in the 25th section of the act of 15th March, 1832, requiring the register to appoint a register's court for the decision of disputable and difficult matters? Has that provision ceased to be operative with the abolition of the register's court, and have parties lost the rights secured to them by that provision? By no means. The Orphans' Courts, by the express words of the Constitution, and by the act relating to the organization of Orphans' Courts, passed May 19, 1874, succeed to "*all the powers and jurisdiction of the registers' courts.*" This is a part of that power and jurisdiction, and with all the other powers and jurisdiction of the registers' courts, it has passed to the Orphans' Courts. That which belonged before to the register's court, belongs now to the Orphans' Court. That which the register's court could do and was bound to do before, the Orphans' Court can do and is bound to do now. It was not the purpose of the Constitution in abolishing the register's court, to impair any right or take away or abridge any remedy provided by the act of 1832. The intention was to provide a new jurisdiction which should preserve these rights and administer these remedies. The 25th section of the act of 1832 has not, in our opinion, been repealed by the Constitution, and if not, then there is no mode which we can conceive of by which its provisions can now be carried into effect, except by requiring the register to submit to the adjudication of the Orphans' Court the questions which before he was required to submit to the register's court. That he is bound to do so is, we think, a necessary implication from the alteration made in the law by the Constitution. Therefore, when any "disputable or difficult matter comes into controversy before the register," relating to the probate of a will, it is we think the duty of this officer upon the request of any party in interest, to remit the matter to the Orphans' Court for its decision, that being the tribunal which is substituted in the place of the register's court. We entertain no doubt whatever that it was his duty to have done so in this case. The matter before him being the validity of a paper offered for probate as a will, which was attacked upon the ground

of incompetency, fraud, and undue influence, and questions of law arising before him in regard to the admissibility of evidence, it was his duty upon the request of either party to have desisted from further proceedings, and to have sent the matter to the Orphans' Court for adjudication.

That the register could not compel the attendance of the witnesses who were produced before him in no manner touches the question. They were there ready with their testimony. It was his duty to receive or reject it, and if either party objected to his decision and demanded that the matter should be sent to the Orphans' Court, it was his duty under the act of 1832 and the new Constitution to proceed no further with it, but to transmit it to the Orphans' Court, which the Constitution has substituted for the register's court. He could not "appoint" an Orphans' Court, as he was required by act of 1832 to appoint a register's court, but he could perform the equivalent act which was necessary to carry into effect the new constitutional provision, viz., certify the proceedings to the Orphans' Court. The parties were at liberty to produce their witnesses before the register and to submit the contest to his decision, for what the Constitution has destroyed is not the functions and duties of the register, but those appertaining to the register's court. But if at any time during the progress of the proceedings they became dissatisfied with his rulings and demanded that the controversy should be sent into the Orphans' Court, we cannot understand upon what grounds the register could lawfully refuse to do so, or how that court could refuse the jurisdiction imposed upon it by the Constitution. There is therefore here a specific legal right, and one, it seems, without any other adequate legal remedy for its enforcement than that which the relator prays for.

In view of that clause of the Constitution which makes the register of wills clerk of the Orphans' Court, and declares that he shall be subject to its directions in matters pertaining to his office, although we do not regard it as ousting the jurisdiction in mandamus conferred upon the Courts of Common Pleas by the act of 14th June, 1833, nevertheless, we should feel strongly inclined in the exercise of that discretion which may often justly influence the allowance of this writ, to refuse the writ of mandamus and to remit the relator to the Orphans' Court for redress, if the relator had not previously sought a remedy in that court. But inasmuch as she has heretofore made application to that court for an order upon the register to certify these proceedings to the Orphans' Court, and has been refused upon grounds which were satisfactory to that court, and which it is no part of our duty to inquire into, it is manifest that if we refuse the writ she will be absolutely without remedy, although possessed of an indubitable right. Under such circumstances it appears to us that the writ of mandamus is demandable of common right.

Therefore it is considered that a writ of alternative mandamus be awarded against the said Gideon Clark, register of wills, commanding him to certify the said paper offered for probate as the last will of Elizabeth Burns, together with the testimony and all proceedings had before him relating to the same, to the Orphans' Court, and that the said writ be returnable on the first Monday of April, 1875.

Michael Arnold, Esq., and Hon. Richard Vaux, for petitioner and relator.

C. H. Sidebotham, Esq., and Hon. F. Carroll Brewster, contra.

[Leg. Int., Vol. 32, p. 117.]

CABADA vs. DE JONGH et al.

A merchant agreed to accept bills drawn by his correspondent to the amount of two-thirds of the value of an intended shipment. The vessel and cargo were lost, and the consignees were authorized by all parties in interest to settle with the insurance company for two-thirds of their claim. The consignors having drawn in excess of the amount agreed, and the insurance money being consequently insufficient to pay all the drafts, the court held that they ought to be paid in full in the order in which they were presented, until the fund was exhausted.

In equity. Sur exceptions to master's report.

L. S. De Jongh was a resident of the town of Gibara, in the island of Cuba. On December 9, 1872, the firm of Latasa & Co., New York, despatched the schooner "Ernest and Marie," loaded with a cargo, consigned to De Jongh, at Gibara. De Jongh wrote to Latasa & Co., that he would pay for the cargo sent him either by a return shipment, if he sent the schooner back to New York, or by drafts if he should send her to Philadelphia. While the schooner was still on her way from New York to Cuba, De Jongh wrote to plaintiffs to inquire upon what terms they would consent to receive a consignment of sugar and molasses from him by the same vessel; and, receiving a satisfactory answer, that they would allow him to draw on them for two-thirds of the consignment on sending them shipping documents, he wrote them on January 21, 1873, that he had determined to despatch the "Ernest and Marie" to their charge with a mixed cargo—not sugar and molasses, as he had at first proposed, but composed mainly of tobacco. This letter enclosed the charter-party of the schooner; but the bills of lading, etc., showing the value of the consignment, were sent in a subsequent letter. This consignment, and the correspondence and drafts which followed it, were the only business transactions plaintiffs ever had with De Jongh. In the letter of January 21, he informed plaintiffs that he had drawn upon them for \$10,000, in favor of Demestre & Co., and of his intention to send another draft on account of the cargo. In a letter of January 29, 1873, he informs plaintiffs of two more drafts drawn by him upon them, one for \$7,000, in favor of Latasa & Co., of New York, and the other for \$2,000, in favor of E. Churchill & Co., Portland, both drawn on the credit of the consignment.

None of these letters reached plaintiffs before February 15, 1873, all three of them being post-marked in New York on that day.

The value of the cargo, as appeared by the bills of lading, was \$30,656.35, and the three drafts aggregated \$19,000, very nearly the two-thirds which plaintiffs had authorized him to draw for.

In the meantime the \$10,000 draft had been negotiated by Demestre & Co., and had been presented to plaintiffs in Philadelphia for acceptance on February 4, 1873. Of course, acceptance was refused, as plaintiffs had not then received advice of the sailing of the "Ernest and Marie," nor had they received shipping documents, and on that same day the draft was protested for non-acceptance.

The first information which plaintiffs received of the sailing of the schooner was a letter from the captain, dated at Jacksonville, Florida, apprising them of the total loss of the vessel and cargo at sea. This letter was dated February 10, 1873.

The plaintiffs had in force at the time an open policy of insurance, issued by the Insurance Company of North America, whereby all cargoes consigned to them from the West Indies were insured at their invoice value, with ten per cent. added. They immediately claimed the amount of loss from the insurance company, and took steps to prosecute the claim with effect, as the company, under the circumstances, declined to make payment.

On the 1st of January, 1873, Latasa & Co. were merged in the Commercial Warehouse Company of New York, and the draft of \$7,000, dated January 29, 1873, at sixty days, of which plaintiffs were advised by De Jongh in letter of that date, was drawn by him upon plaintiffs in favor of the Commercial Warehouse Company. This draft, and also that of \$2,000 (same date), at sixty days, in favor of E. Churchill & Co., of Portland, were presented for acceptance February 17, 1873, after plaintiffs had received De Jongh's advices and shipping documents, and also had received the captain's letter from Florida; and acceptance was declined, but plaintiffs wrote to the holders that they would take care of those drafts when they collected the amount due from the insurance company.

The Commercial Warehouse Company received from plaintiffs a conditional acceptance of their draft, "payable only when in funds from the insurance on cargo of the 'Ernest and Marie,' February 19, 1873." Afterwards they caused it to be protested for non-acceptance, as they aver, "for greater security." Churchill caused their draft to be protested for non-acceptance February 25, 1873.

On the 19th of February, 1873, the Commercial Warehouse Company commenced an action by foreign attachment against De Jongh, defendant, and E. F. Cabada & Co. (present plaintiffs), garnishees, which writ was served on said garnishees February 20, 1873.

On the 5th of March, 1873, De Jongh, in answer to a request from Latasa & Co., sent them a draft of that date, drawn by him on plaintiffs for \$1,000, at thirty days, to the order of the Commercial Warehouse Company, on account of consignment "Ernest and Marie," which was presented for acceptance March 19, 1873, and accepted conditionally, like the previous one, and protested for non-acceptance. A draft for \$1,000, dated April 7, 1873, in favor of the same party, was treated in the same way. The drafts thus amounted in all to \$24,000.

The drawer (who had become insolvent) and the holders of these drafts consented that the plaintiffs should compromise their claim against the insurance company upon receiving from the company the sum of \$20,000, *without prejudice to their alleged rights to priority of payment*, and this settlement was accordingly made. The funds thus placed in the hands of the plaintiffs, being insufficient to pay all the holders in full, and no agreement being reached as to a distribution (for each claimed a right of priority), the plaintiffs filed this bill of interpleader against all the holders as defendants, in order that it might be determined in what order of precedence the drafts should be paid.

The *billetes del banco Espanol*, mentioned in the opinion as due by De Jongh to Demestre & Co., were charged to the former on the books of the latter, on April 19, 1873, in consequence of the draft for \$10,000 not

being accepted, the amount being adjusted according to the difference in the market value of United States and Cuban currency at that time.

Opinion delivered *March 13, 1875*, by

THAYER, P. J.—The facts out of which the present litigation arises are stated with so much particularity of detail by the master, that it is unnecessary to recapitulate them here. It is sufficient to say that upon a careful consideration of the facts and of the principles of law which are to be applied to them in determining the rights of the several claimants, we are of opinion:

1. That the bills drawn by De Jongh upon Cabada & Co. did not alone and *proprio vigore* amount to an appropriation of the proceeds of the cargo in the hands of Cabada & Co.

2. That the conditional acceptances were, *as such*, of no avail in consequence of the protest of the drafts made by the holders.

3. We are by no means clear that the evidence does not show an equitable assignment of so much of the fund derived from the insurance on the cargo as is necessary to pay the real amount of the indebtedness of De Jongh to Demestre & Co., upon the draft for \$10,000, his indebtedness to the Commercial Warehouse Company upon the draft for \$7,000, and to Churchill & Co. upon the draft for \$2,000, inasmuch as it clearly appears that, notwithstanding the protests of these drafts, Cabada & Co. promised both De Jongh and the payees of these drafts that they would apply the money to be received from the cargo, or the insurance, to the liquidation of these debts. This appears by the letters of Cabada to De Jongh of February 12, 1873, and February 19, 1873, of Cabada to Churchill, February 18, 1873, and in other parts of the correspondence, especially in that between Cabada and Celalier. A promise by Cabada & Co. to De Jongh to apply the cargo, or the proceeds of the insurance upon it, to the liquidation of his indebtedness to these parties, acquiesced in by De Jongh, and communicated to and accepted by the parties themselves, would seem to contain all the necessary requisites of a good equitable assignment. These promises were also in fulfilment of the original purpose of De Jongh, the consignor, that the cargo should be first applied to the payment of these debts. However this may be, the decision of the master may well be sustained, upon the ground upon which he has placed it, viz., that upon the facts proved a right of priority of payment springs from the liability of Cabada & Co. to De Jongh, upon the promises made by them to him to pay these drafts out of the cargo or its proceeds, and their right to be discharged from their liability upon these promises by applying the proceeds to the payment of these drafts. It is to be noted that although Cabada & Co. refused to accept the drafts in consequence of the non-arrival of the cargo and shipping papers, yet their letters of February 12 and February 19, 1873, contain distinct promises to De Jongh to pay the drafts out of the cargo or the insurance upon it as soon as received.

4. That the promise of De Jongh to Latasa & Co., contained in his letter to them of November 5, 1872, to reimburse them for goods shipped to him "by a return shipment or drafts" was neither a legal nor equitable assignment to them of the cargo of the "Ernest and Marie," or

its proceeds, and gives them no equitable lien upon the proceeds in the hands of Cabada & Co.

5. That the Commercial Warehouse Company obtained no right of priority over Demestre & Co. or Churchill & Co., by reason of their attachment against De Jongh, of February 19, 1874, inasmuch as Cabada & Co.'s liability to De Jongh was at that time fixed by the promises made to him to apply the proceeds of the cargo to the bills drawn by him.

6. That the substituted cargo or its proceeds having been received upon the same terms and under the same agreement to which the original cargo was subject, the liability of Cabada & Co. to De Jongh upon their promises contained in the letters of January 8, February 12, and February 19, 1873, is the same as if the fund in court had been derived from the cargo which was originally agreed to be sent.

7. That the evidence shows that three only of the drafts were drawn in pursuance of the authority and agreement contained in the letter of January 8, 1873, viz., Demestre & Co.'s draft for \$10,000, the Commercial Warehouse Company's draft for \$7,000, and Churchill & Co.'s draft for \$2,000.

8. That the amount to be paid to the holders of these drafts is correctly measured by the extent of Cabada & Co.'s liability to De Jongh upon their promises to pay them, and that this liability is represented not by the face of the drafts, but by the extent of the indebtedness of De Jongh to the holders of them.

9. That the indebtedness of De Jongh to Demestre & Co. is the value in United States currency of the *billetes del banco Espanol* which De Jongh owed them on the 19th April, 1873.

The exceptions are therefore dismissed. The report of the master is confirmed and distribution is decreed accordingly.

George L. Crawford, Esq., and Hon. Benjamin Harris Brewster, for Commercial Warehouse Company and De Jongh.

Graham Calvert and John Fallon, Esqs., for Demestre & Co. and Churchill & Co.

[Leg. Int., Vol. 32, p. 239.]

THE CITY OF PHILADELPHIA vs. ESAU. SAME vs. COLLUM.

1. Under the act of 11th of March, 1846, material averments contained in the municipal claim filed are *prima facie* evidence of the things averred.
2. *City vs. Reilly*, 10 S. 467, distinguished from this case.

Rule for a new trial. Opinion delivered June 26, 1875, by

THAYER, P. J.—These suits were founded upon municipal claims for macadamizing Mill street, in Germantown, in front of property owned by the defendants, which claims were filed under the provisions of the act of 24th March, 1870, establishing a separate highway department for the Twenty-second ward of the city of Philadelphia. The act authorized such work to be done only upon a petition to the superintendents by a majority of the owners of property fronting on the improvement to be made. The defendants, among other pleas, pleaded that the work set forth in the claim filed was not petitioned for by a majority of the owners of property fronting on Mill street, and an issue of fact was

joined upon this plea. Upon the trial the only evidence given by the plaintiffs to sustain this issue was the claim filed, which was put in evidence, and contained a distinct allegation that the macadamizing of the road had "been duly petitioned for by a majority of the owners of property fronting on said Mill street, within the space or distance macadamized." The defendants maintain that it was incumbent on the plaintiffs to give other evidence than the claim filed, in order to sustain the issue, and they rely upon *The City vs. Reilly*, 10 Smith, 467. In *The City vs. Reilly*, one of the issues was, whether the contractor had been selected by a majority of the property-owners, a point which it was necessary to establish in order to enable the plaintiff to recover. The defendant filed a special plea denying that the contractor was so selected, and the plaintiff having taken issue upon it, the point ruled was, that it was a material issue and that the burthen of proving it lay upon the plaintiff. As it was not proved in any way, it was held that the judgment was properly entered for the defendant upon the point reserved. We have examined the record in the case of *The City vs. Reilly*, and it shows that in the claim which was put in evidence by the plaintiff in that case, there was no averment of the fact that the contractor had been selected by a majority of the property-owners. There was therefore no evidence whatever, either in the claim filed or out of it, to prove a fact essential to the plaintiff's case, and the burthen of proving which he had taken upon himself. The act of March 11, 1846 (Purdon, 1089), enacts that such claims "may in suits thereon be read in evidence of the facts therein set forth." Accordingly, it has been uniformly held since the passage of that act, that such claims, when put in evidence, are *prima facie*, but not conclusive evidence of the facts set forth in them: *Northern Liberties vs. St. John's Church*, 1 Harris, 104; *City vs. Burgin*, 14 Wright, 545; 5 Philada. Rep. 84; *Brinton vs. Perry*, 1 Philada. Rep. 438. *The City vs. Reilly* is no authority to overthrow these decisions (which indeed cannot be overthrown without nullifying the act of assembly), because, in *The City vs. Reilly*, the claim put in evidence contained no averment whatever of the fact which the plaintiff was bound to prove. In the present case, however, there is in the claim put in evidence a full and distinct allegation of the fact which was put in issue, and we think the jury were therefore properly instructed that the claim was *prima facie* evidence that the improvement ordered by the superintendents of highways of the Twenty-second ward had been petitioned for by a majority of the property-owners, and that upon this *prima facie* case being made out the burthen of overcoming it by contrary proofs was shifted to the defendants.

Rightly understood, therefore, there is no conflict between the ruling in this case and that which was made in *The City vs. Reilly*.

Edwin S. Dixon and Charles E. Morris, Esqs., for plaintiff.

Louis D. Vail, Esq., for defendant.

[Leg. Int., Vol. 32, p. 239.]

BLANCHARD vs. REYBURN.

1. To enable a private person to maintain a bill in equity for the prevention or remedy of a public nuisance, he must show that he will sustain a private injury, separable from and in addition to the public inconvenience.
2. Equity will not enjoin against merely fanciful inconveniences, but only against such injuries or inconveniences as naturally interfere with the ordinary comfort, physically, of human existence.

Sur motion for a preliminary injunction. Opinion delivered June 26, 1875, by

THAYER, P. J.—The plaintiff is the owner of a dwelling-house and lot, situate on the south side of Spring Garden street, at the distance of seventy-five feet eastward from the east side of Nineteenth street. The defendant is the owner of a lot of ground, situate at the southeast corner of Nineteenth and Spring Garden streets, upon which he is now erecting a dwelling-house. The plaintiff complains that the defendant has commenced, and is about to construct, a bay window, which will extend about four feet nine inches over the lawful building line of the street into the highway; that this structure will be a public nuisance, and will also greatly annoy and injure the plaintiff in the enjoyment of his property by impeding the free passage of light and air to his premises and by obstructing the view therefrom upon the public highway. He seeks, therefore, by the present motion, to enjoin the defendant from erecting the said bay window.

It appears by the *ex parte* affidavits which were read on the hearing of this motion and by the city ordinances that the width of Spring Garden street, from house to house, is 120 feet, and the distance from the curb to the house line, on each side of the street, is thirty-five feet. By ordinance of April 28, 1860, the footways of Spring Garden street, west of Broad street, were to be thirty-five feet wide, but this must be regarded as having been essentially modified by the ordinance of April 23, 1864, the 12th section of which, by a clear implication, permits the enclosure of spaces in front of the houses, provided they do not reduce the footway to a width of less than sixteen feet. Under this implied license sixteen feet of the thirty-five feet mentioned, in front of the house line, have been enclosed by the owners of property on the street by iron railings for the purpose of making small yards, or flower gardens. A clear space of nineteen feet is thus left for a footway, outside of the enclosed plots, which is three feet more than the space required to be left for the purpose by the ordinance. All the houses on Spring Garden street, from Seventeenth street to Twenty-third street, and beyond, on both sides of the street, including the plaintiff's, have these enclosed yards or gardens in front of them. They are generally sodded and planted with flowers. Many of them are ornamented with fountains, vases, and other works of art, and they add much to the beauty of the street. The bay window, which the defendant proposes to erect, is within one of these enclosures, and so does not obtrude upon, or in any manner whatsoever obstruct, the footway of the street. No person has a right of passage there, and the use of the street as a highway by the public is in no manner impaired or injured thereby.

The plaintiff alleges that the proposed erection is contrary to law; that it is an encroachment upon the public highway—a *pourpresture*—and so a public nuisance; and, in addition to this, that it is an injury to his private property. To maintain the former proposition, he relies upon the ordinance of September 23, 1864, which declares that it shall be a nuisance “to project any bulk window more than one foot into the footway beyond the building line,” or “to place or maintain any cellar-door, porch, or steps, which shall extend more than four feet six inches into any footway of any street, etc.,” “or to make any other encroachment on any footway of the city, except as therein allowed.” The penalty for the violation of these provisions is a fine of two dollars, to be recovered at the suit of the city of Philadelphia. The acts under which this ordinance was passed are the act of 18th of February, 1769 (1 Smi. L. 301), and the act of 16th of April, 1838 (1 P. L. 606).

Now it is obvious that the proposed erection will not extend into the footway at all, and so does not, in any respect, abridge the plaintiff's right of passage along the street, or that of the public, for the public have no right of passage over the ground which is contained within the enclosures. The right to enclose necessarily implies that the public are to be excluded from using the parts enclosed as a highway. We do not mean to decide that the owners of property in this locality have a right to advance the fronts of their houses, so as to embrace the ground which they were licensed to enclose, which, in our opinion, would be a bold assumption, or that they have any right to build upon the space allotted to the enclosures. All that we decide is, that neither the plaintiff nor the public have any right of passage over the ground enclosed, and that therefore the plaintiff's allegation in his bill, that the proposed bay window will extend into the public highway, is not maintained. Whether the defendant, by the character of the structure which he is about to erect, will exceed the limits of his lawful right, as between him and the city, or the public, is a question which we may well leave to be determined when it is brought before us by proper proceedings on the part of the city or the public.

The owners of property on Spring Garden street seem to have acted under the belief that by erecting bay windows within the enclosures they were not encroaching upon any public right. In the square below that in which the defendant's lot is situated, there are seven or eight such windows, and several in the square above. The same is to be observed on Broad street, on Green street, and in many other parts of the city, where enclosures have been permitted in front of the dwellings by the public authorities. The plaintiff himself has steps to his house, within his enclosure, extending eight feet beyond the building line, which is three feet six inches in excess of his right, as he now expounds it, and a balustrade extending three feet beyond the line. Not that the argument of *tu quoque* ought to have much weight in deciding such a question as this; nevertheless the plaintiff's own conduct seems to be in accord with the views upon which the defendant and other property-owners in this locality have proceeded in making improvements upon their property.

Whether bay windows and other similar ornamental and convenient appendages, which it is the common practice to erect within these enclosures, are a technical violation of the letter of the city ordinances, is

a question which we will decide when it is properly before us between proper parties. All that we decide at present is, that the plaintiff's allegation in his bill, that the defendant's bay window will invade the public highway, and will on that account be a public nuisance, is not sustained.

But it is necessary, in order to entitle the plaintiff to the extraordinary remedy by injunction, that he shall show more than an injury to the general public. Public injuries of this nature, if it be a public injury, are not redressed at the suit of private individuals, for that would be to expose a man to an infinite multitude of lawsuits. A party cannot employ civil process in a private suit to punish public wrongs. The State or city authorities are the proper persons to set on foot such proceedings. The plaintiff, in order to entitle himself to the writ of injunction, must show that he is about to suffer a private injury over and above the general prejudice which may result to the public: *Spurhawak vs. The Union Passenger Railway Company*, 4 Smith, 401; *Spencer vs. London and Birmingham Railroad Company*, 8 Sim. 193; *Haines vs. Taylor*, 10 Beavan 75; *Walter vs. Selfe*, 20 Law Jour., Rep. N. S. Chancery, 433; *Mitford's Pleadings*, 168; 2 Story's Equity, § 924. Courts of equity will sometimes interfere by injunction to restrain the erection of buildings in violation of private contracts, covenants, and conditions between parties and their privies. Such were the cases of *Pennsylvania Railroad Company vs. Pittsburgh Grain Elevator Company*, 14 Wright, 509; *Clark vs. Martin*, 13 Wright, 290; but never to settle a public controversy at the suit of private individuals. It was necessary, therefore, that the plaintiff, in order to succeed upon the present motion, should establish the fact beyond all reasonable doubt, that he would himself sustain a private injury, separable from and in addition to the public inconvenience. In the attempt to do this he has totally failed. We are satisfied by the affidavits of many highly respectable witnesses, including adjoining residents, neighbors, architects, builders, and public officials, that the injury which the plaintiff apprehends from the bay window is altogether imaginary. It is over sixty feet from his front door, and separated from him by another dwelling-house. It cannot possibly darken his windows, or obstruct the passage of air to his dwelling. It cannot intercept the sunshine or the starlight. It will not be visible to any person sitting at any window of the plaintiff's house. A mocking-bird in a cage would, to some people, be a much more serious annoyance than any which the plaintiff can possibly experience from the bay window. The question to be determined in all such cases as this, is that which was very well stated by Vice-Chancellor Knight Bruce, in the case of *Walter vs. Selfe*, viz., "Can the inconvenience complained of be considered in fact as more than fanciful? Is it one of mere delicacy or fastidiousness, or is it an inconvenience naturally interfering with the ordinary comfort, physically, of human existence; not merely according to elegant or dainty modes of living, but according to plain, simple, and sober notions among English people?" Upon this point the evidence is against the plaintiff. We find no reason whatever for believing that the intended structure will materially interfere with the ordinary comfort, physically, of his existence. He may not admire bay windows in general, or this bay window in particular. He may not,

as he stands upon his top step, derive that pleasure from the contemplation of it, which the defendant's witnesses think he ought to receive from its graceful proportions and ornate workmanship, but if he will only descend to the lowest step he will enjoy the view from a vantage ground more than three feet advanced beyond the extreme outward verge of the obnoxious object. It is not, however, for the prevention of such fanciful inconveniences and such unsubstantial injuries that the right arm of a court of equity is to be stretched forth.

The motion for an injunction is refused.

N. H. Sharpless, Esq., for plaintiff.

C. B. Penrose and E. Spencer Miller, Esqs., for defendant.

[Leg. Int., Vol. 32, p. 239.]

THE COMMONWEALTH OF PENNSYLVANIA *ex relatione* FURMAN SHEPARD vs. C. H. T. COLLIS, CITY SOLICITOR, *et al.*

The provisions of the 4th section of the 14th article of the constitution, which declare that "the compensation of county officers shall be regulated by law," and "that in counties containing over 150,000 inhabitants all county officers shall be paid by salary," are prospective in their operation, dependent upon legislative action, to carry them into effect, and do not repeal existing laws until the new laws are passed.

Motion for a writ of mandamus. Opinion delivered June 26, 1875, by

THAYER, P. J.—The facts out of which this case arises are undisputed.

By the petition and return it appears that the relator, Furman Shepard, was duly elected to the office of district attorney for the city and county of Philadelphia, on the 3d day of November, 1874; that on the 4th of January, 1875, he was duly qualified, and entered upon the duties of his office; and that he has continued to discharge the duties of the said office from that date to the present time. During this period he has received no compensation for his services. By an ordinance of the select and common councils of the city of Philadelphia, approved by the mayor December 31, 1874, the sum of \$10,000 was appropriated to pay the district attorney. This ordinance was accompanied by the usual proviso, "that the controller shall sign no warrant drawn upon the appropriation until furnished with a certificate of the city solicitor, that he has carefully examined the charges and fees, and compared them with the law and the docket entries, and other records of the court, and finds the fees and charges to be correct and legal, and these warrants shall be drawn for the said appropriation by the city commissioners, in conformity with existing ordinances." The district attorney has presented to the city solicitor his bill for the fees to which he alleges he is entitled according to law for his official services during the month of January, 1875, and it is not denied that the charges contained in the bill are just, true and correct, according to the provisions of the act of March 31, 1860, regulating the fees to which the district attorney is entitled. But the city solicitor and the other city officers, whose instrumentality is necessary to give effect to the appropriation, being in doubt whether these fees could be lawfully paid to the district attorney, in consequence of the provision contained in the 5th section of the 14th article of the constitution, have declined to perform the necessary acts to enable the district

attorney to receive payment, unless it should be judicially determined that the constitution interposes no bar to his demands. The question thus raised is, whether that provision of the constitution which requires all county officers in counties containing over 150,000 inhabitants, to be paid by *salary*, was intended to take effect immediately upon the adoption of the constitution, or at such time as the constitutional mandate should be carried into effect by the legislative action which is necessary to adjust and regulate the salary which is to be paid. This question concerns only such county officers as have been elected since the adoption of the constitution; for as to those who were in office at the time of the adoption of the constitution, and who receive their compensation in the form of fees, the 29th section of the schedule provides that they shall continue to receive the same compensation until the expiration of their respective terms of office. Over these, therefore, the Legislature has no power, and the salary system can only be applied to their successors in office. As to those county officers who have been elected since the adoption of the constitution, who have faithfully performed their duties, and for whom no salary has yet been provided by law, the question is a very serious one. It rises also into a question of great public importance, when it is considered that if these officers are not entitled to any present compensation, and the Legislature should neglect for a considerable period longer to provide proper salaries, the offices themselves may become vacant, to the subversion of public order, the obstruction of public justice, and the great detriment of the public interests. Nearly eighteen months have elapsed since the constitution took effect, and yet various causes have prevented, thus far, the consummation of any law providing a salary for the district attorney of this county. Is he to continue to discharge the duties of this office for an indefinite period without any compensation for the labor and responsibility which are incidental to them? If this result is a necessary one arising from the plain language of the constitution; if it is the plain intent of that instrument that all previous laws relating to this subject should be instantly abrogated upon the adoption of the constitution, and that in the interval which must necessarily elapse between the adoption of the constitution and the perfection of the legislation necessary to carry into effect the new order of things, these responsible offices should be filled without any compensation fixed by law, and left, consequently, in such a condition that the incumbents could receive no present compensation whatever, then the inconvenience, both public and private, however great it may be, must be submitted to. If the constitution is plainly and indubitably against the relator, it is of no avail to say *quod remedio destituitur*. But in doubtful cases, arguments drawn from inconvenience are of great weight, and especially in regard to questions of intention.

The 5th section of the 14th article is as follows:

"The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried, shall pay all fees, which they may be authorized to receive, into the treasury of the county or State, as may be directed by law. In counties containing over 150,000 inhabitants all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term, and collected by or for him."

The 31st section of the schedule declares that "the general assembly at its first session, or as soon as may be after the adoption of this constitution, shall pass such laws as may be necessary to carry the same into full force and effect." It is plain from this provision and from other parts of the constitution, that as to some portions of the constitution it was perfectly well understood that they could only be carried into effect by future legislation. And it results, both as a fair inference of the intent of the framers, and also as a logical conclusion, that where future legislation was indispensable in order to give effect and vital activity to such provisions, they should take effect from the time when such indispensable legislation should carry them into effect and give them vital activity and force.

For how can that be said to take effect immediately which cannot possibly, in the nature of things, take effect until some future act is performed? "The compensation of county officers shall be regulated by law." "In counties containing over 150,000 inhabitants, all county officers shall be paid by salary." What is this but to say that the Legislature shall enact a law regulating the compensation of county officers, and the compensation which they shall fix shall be a salary? Is there any evidence of an intent here to disturb existing laws in the interval which would elapse between the adoption of the constitution and the action of the Legislature? Was it intended that as to new officers elected there should be no law in force upon these subjects until the Legislature should act, and that the counties should not be able under existing laws to pay their public servants until the Legislature should discharge the duty enjoined upon it by the constitution? Were all the old laws upon this subject paralyzed and made void before the new laws were made, so that for a space of time, longer or shorter, as the case might be, there was to be no law upon the subject at all? To impute such an intent to the framers of the constitution is to impute to them a great want of foresight, and a great lack of skill in making the transition from the old government to the new easy, practicable and safe.

Two departments of the State government, the executive and the legislative, have put upon this and a somewhat analogous provision of the constitution, an interpretation more conformable, we think, to the intention of its framers. Section 9 of the 6th article declares that no pardon shall be granted, or sentence commuted, except upon the recommendation in writing of the lieutenant-governor, secretary of the Commonwealth, attorney-general, and secretary of internal affairs. Yet nobody supposed that the pardoning power was suspended until a lieutenant-governor and secretary of internal affairs should be elected, and the executive exercised the pardoning power in the interval elapsing before the election of those officers, calling to his assistance, in order to comply with the constitution as far as possible, the attorney-general and the secretary of the Commonwealth. It is also well known that the provisions of the salary bill, which passed the Legislature at the session of 1874, but which failed to become a law, and of the bill which passed the senate at the session of 1875, were prospective in their operation, and the county officers, when their terms expired, were "to settle their several accounts under existing laws." This was a clear legislative declaration that it was considered that the existing laws remained in force until the new law should come into operation.

By the second section of the schedule of the constitution there is an implied repeal of all laws inconsistent with the new constitution—a declaration which adds nothing to the constitution, for the effect of its adoption would have been the same without any such declaration. But it is not perceived that a provision of the constitution which contemplates a future change in particular details of the government, and which enjoins it as a duty upon the legislative department to inaugurate such change by the passage of laws necessary and proper to produce it, is inconsistent with the continuance of existing laws until the prescribed change is effected in the manner pointed out by the constitution. On the contrary, the delegation of power to the Legislature to make the prescribed change “at its first session, or as soon as may be,” implies that the change is not to be made except in the prescribed manner and by the prescribed instrumentality, and that until the change is so made the old law is to remain in force. Any other construction would, as has been pointed out, leave us without any law at all in the interval which is to elapse before the change can be effected in the manner ordained by the constitution, and we cannot suppose that that was intended which would produce so great a public inconvenience, especially when an attentive examination of the whole instrument will show that the framers were in all their work very careful to avoid sudden and violent changes, and refrained whenever they could, from pulling down any part of the old structure until the new parts were made ready which were to subserve the same purposes and to furnish better security and protection for the people.

Extensive and fundamental changes were made in the organic structure of all departments of the government, but so made that no sudden violence was offered to either, that no interregnum should ensue, and that the functions of government should experience no interruption in their existence and no abatement in their vigor. In general, the various officers of the government were continued for the periods for which they had been elected or commissioned, and where organic changes were made they were to be carried into effect at a prescribed future period. In the meantime the old organism was preserved, and continued to discharge its allotted functions until the period arrived when the changes were to be made, so that the people passed from the old government to the new as easily as a man would pass from an old chamber to a new one freshly built and added for his accommodation.

Now, in the face of this obvious purpose, on the part of the framers of the constitution, to preserve intact all the old instrumentalities by which the government was carried on until the new changes were effected, which were to supersede them, we are asked to put an interpretation upon the 5th section of the 14th article, which is directly opposed to this beneficial policy. That interpretation would oblige us to say, that where it has become necessary to elect new county officers since the adoption of the constitution, there is no existing provision of law by virtue of which the services which they perform for the public can be compensated. It is only by force of the plainest and most indubitable language in the constitution that such a conclusion can be forced upon us. But we find no such language in the constitution.

The constitution declares that the compensation of county officers shall

be regulated by a law to be enacted by the Legislature, and that in passing such a law the Legislature shall, for counties containing over 150,000 inhabitants, adjust the compensation by a salary to be paid to the officers of such counties, and the 31st section of the schedule enjoins it upon the Legislature to pass such laws as may be necessary to carry into effect this and all other provisions of the constitution. It nowhere declares that existing laws, providing for and regulating the compensation of these officers, shall be repealed before the passage of the new laws which are to supersede them, and which are to carry the new provision of the constitution into effect. Nor can such an implication be anywhere found in the constitution. It cannot be derived from the second section of the schedule, because it is not inconsistent with the new constitution that the old law should remain in force until the new law is passed. On the contrary, it appears to us that it is a necessary and reasonable presumption that the constitution contemplates nothing else than that the old law, regulating the compensation of county officers, should remain in force until the Legislature shall pass the new law to carry into effect the prescribed change. This appears to us to be the true intent and interpretation of the constitution. It is in accord with the general scope and plan upon which the instrument is framed. It prevents a public inconvenience and a private injustice, and is not in conflict with either the letter or spirit of any provision of the constitution. In effect, the constitution says that the Legislature shall, as soon as may be, make all county officers, in counties containing over 150,000 inhabitants, salaried officers, but that, until such change is effected, all laws relating to the subject "shall continue as if this constitution had not been adopted."

But it is said that the Legislature may evade its constitutional duty, and so the provision of the constitution may become nugatory and fail of its effect. But little weight is due to such an argument. The government of the Commonwealth is in the hands of the people of the Commonwealth, and they will know what to do if their agents abuse their trust and refuse to perform their constitutional obligations. It is not conformable to reason or experience to suppose that the people of this State will continue in their employment agents who refuse to execute their will. Nor does anything in the past justify the fear which is the basis of the argument. It is well known that at the session of 1874 the Legislature passed a salary bill for county officers, but it failed to meet the approval of the executive, for satisfactory reasons. It is also well known that a bill, having the same object in view, passed the senate at the session of 1875, but failed to pass the house. There are difficulties inherent in the subject, arising out of the interests of many communities, which are to be adjusted upon principles of justice and equality. But there is no reason whatever to suppose that the Legislature have sought in the past, or will seek in the future, to evade the duty which the constitution imposes upon them in this behalf, or that they will fail to carry into effect the mandate of the constitution. In the meantime, there is happily an existing law, which removes an obstruction which might otherwise possibly arise in the administration of criminal justice in this county, and saves the county from the disgrace of being obliged, against its will, to refuse compensation to an able and faithful public officer for most laborious and meritorious service.

Upon a careful consideration of the whole subject, we are of opinion

that the act of March 31, 1860, regulating the compensation of the district attorney of Philadelphia, remains in full force until such time as the Legislature shall, in obedience to the precept contained in the constitution, make a law providing a salary for that office.

Wherefore, it is considered and adjudged that the return made by the defendants to this rule is insufficient in law, and a peremptory writ of mandamus is awarded, as prayed for by the relator.

David W. Sellers, Esq., for the Commonwealth.

Robert N. Willson, Esq., for respondent.

[Leg. Int., Vol. 32, p. 240.]

MULLEN vs. MAGUIRE.

Judgment will be entered against a garnishee on the amount admitted in his answer to be due, although it became due after plea filed by the defendant.

Rule for judgment upon garnishee's answers. Opinion delivered June 26, 1874, by

BRIGGS, J.—The contention of the parties grows out of this part of the garnishee's answers: "The sum of \$58 became due on the 9th of March, 1875, but your respondent is informed and believes that a plea was filed in the above case on the 4th of March, 1875, whereby the case was put at issue, and said amount having come due after issue joined, could not be enforced against him in this attachment."

Who pleaded is not stated. We presume it was the defendant, for had the garnishee pleaded, he would scarcely be so delicate and doubtful in stating his own action, as appears from the use of the language: "Your respondent is *informed and believes* that a plea was filed in the above case on the 4th of March." This is the formula used when speaking of information imparted by another, and not of one's own knowledge or act.

Has, then, the defendant the right, by this act, to snatch the money from the grasp of the attachment? Is such within the contemplation of the act of assembly? The language of the act is: "It shall also be lawful for the plaintiff to exhibit in writing to every garnishee as aforesaid, all such interrogatories as he may deem necessary, touching the estate and effects of the defendant, in his possession or charge, or due and owing from him, as the case may be, to the defendant, at the time of service of such writ, or at any other time, and cause the same to be filed of record in the cause."

The plaintiff's right, under this act, to exhibit his interrogatories to the garnishee is absolute, and in no way dependent upon the action of either the defendant or garnishee. The act was passed for the plaintiff's benefit, to enable him to discover and recover the money and effects of the defendant in satisfaction of the plaintiff's judgment; and should be so construed as to effectuate that end, when such can be done without doing violence to the rights of the other parties.

Such construction does injustice to no one. It pays the judgment of the plaintiff to the extent of the money recovered of the garnishee, and relieves the latter to the defendant to the extent of the payment thus made; and in this way may dispense with other process to obtain satisfaction of the plaintiff's judgment. The act clearly indicates that the

writ may bind the defendant's effects coming to the garnishee's hands after its service: *Silverwood vs. Bellas*, 8 W. 420; *Franklin Fire Insurance Company vs. West*, 8 W. & S. 350. The same section that shows this, also gives the plaintiff the right to exhibit interrogatories to the garnishee for the discovery of defendant's effects in the garnishee's hands. Assuming these to be so, how can the plaintiff be cut short of the exercise of his right by the act of the defendant and garnishee pleading?

This is their act and not his, and should not estop him from pursuing the remedy given him by the act of assembly. Indeed, we do not think that the plaintiff is at all bound to notice the voluntary plea of the defendant or garnishee until after the plaintiff shall have exhibited and received answers to his interrogatories; for, perchance, the answer may dispense with the necessity for a plea by admitting that the garnishee has the money with which to pay the judgment. The plea of "*nulla bona*" denies that the garnishee has goods of the defendant at the time of making the plea, but does not destroy the effect of the act giving the plaintiff the right to have money of the defendant coming to the hands of the garnishee during the pendency of the writ, appropriated in satisfaction of the plaintiff's judgment. The attachment is still pending, notwithstanding the plea, and though at the trial of the issue raised by the plea nothing can be recovered except what was in the garnishee's hands when the plea was filed, for the inquiry is, "How much was then due?" yet until the judgment be entered and the attachment thus brought to an end, we apprehend the garnishee must answer, if required, for money received subsequently to the filing of the plea. The scope of the act seems to warrant this conclusion, for it expressly holds the garnishee liable for the effects of the defendant in his hands "at the time of the service of the writ, or at any other time." This surely means until the writ shall be brought to an end by the judgment of the court in some form thereupon.

Nor is this conclusion inconsistent with the decision of *Silverwood vs. Bellas*, 8 W. 420. For it was there also held that the garnishee was liable for effects received after the service of the writ. The learned court adds: "The rule is the same under the custom of London, from which our acts of assembly were borrowed; this liability being limited, however, to the time of plea pleaded." Our act of assembly is, however, much more comprehensive than the custom of London, for by that custom no discovery was had in the attachment proceeding itself. If discovery was sought under the custom, it had to be obtained by filing a bill on the equity side of the mayor's court for the city of London: Sergeant on Attachment, 29. Whereas our act of assembly gives the discovery in the proceeding by means of interrogatories exhibited to the garnishee. And while the writ is pending—in other words, has not been brought to an end by the judgment of the court thereupon—the plaintiff's right to exhibit his interrogatories continues. The garnishee admitting by his answer that he has moneys of the defendant in his hands, we order that judgment be entered for the plaintiff against the garnishee for the amount thus admitted.

Rule absolute.

Charles W. Katz, Esq., for plaintiff.

John A. Bickel, Esq., for defendant.

[Leg. Int., Vol. 32, p. 248.]

COLLINS vs. NAYLOR.

It is not a material variance between a note and declaration that the place of payment named in the body of the note is not written in the declaration.
Demand at the place fixed for payment is not necessary in order to hold the maker of a note.

Sur rule for new trial. Opinion delivered *July 3, 1875*, by

ELCOCK, J.—This is an action upon a promissory note made by defendant to the order of plaintiff, the body of the note containing the words, "payable at the Bank of Northern Liberties," thus fixing a place of payment. The declaration filed omitted the words quoted, and upon the trial, when the note was offered in evidence, it was objected to by defendant's counsel, on the ground of the variance between the note and the declaration. The note was admitted in evidence and its admission is now alleged as error. If the words quoted were material, the variance would be fatal. In England, for a long time, the question of demanding payment of bills and notes at the place designated in the body of the bill or note, was deemed of such great importance that it divided the Common Pleas and King's Bench. The one court held it a condition precedent to a right of action; the other, that if the debtor had the money at the place at the time, and proved this, and brought it into court, it was equivalent to a tender. The House of Lords finally decided the case (*Rowe vs. Young*, 2 Brod. & Bingh. 165; 6 Eng. Com. Law R. 65), that it was necessary to present the note or bill at the place named. Finally, to settle the question, Parliament passed 1 & 2 George 4, c. 78, by which it was declared "that if any person shall accept a bill of exchange payable at a house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill. But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill except in default of payment when such payment shall have been first duly demanded at such banker's house or other place."

This act, however, in England, has never been applied to promissory notes, and the rule laid down in *Rowe vs. Young* is still the law there as to notes.

In *Sanderson vs. Bowes*, 14 East, 500; and *Roche vs. Campbell*, 3 Campbell, 247, it was decided that the place of payment must be described in the declaration, and a presentment there is essential, in order to charge the maker or any other party.

But in the United States this question has received a different and more liberal ruling since early in this century.

In the *Bank of United States vs. Smith*, 11 Wheaton, 172, it was decided by the Supreme Court of the United States, that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration as proved on the trial.

This was followed by *Wallace vs. McConnell*, 13 Peters, 143, in a very

elaborate opinion, in which the learned judge delivering the opinion of the court, reviews all the cases to that time, both English and American, and affirms the law of this country to be that the demand in such cases need not be averred or proved; if the maker was ready and offered at the time and place to pay, it is a matter of defence to be pleaded and proved by him.

This rule has been followed by the courts of all the States in the Union save Louisiana, where the English rule is adhered to.

In Pennsylvania, our Supreme Court, in *Fleming vs. Potter*, 7 Watts, 380, determined that in an action upon a note for the payment of a certain sum in specific articles and at a certain place, it is not necessary to the maintaining of plaintiff's action, that he should have made a demand of the articles at the time and place, but to defeat the plaintiff's action, the defendant must prove that he was ready at the time and place and continued ready. On failure to make the proof, the plaintiff may recover the amount in money.

In *Filler vs. Beckley*, 2 W. & S. 458, *Wallace vs. McConnell* was adopted as the rule, and in *Middleton vs. Boston Locomotive Works*, 2 Casey, 257, Chief Justice Lewis says, that it is entirely unnecessary to present the note at the place designated for payment when the suit is against the maker. The presentation therefore being unnecessary, the variance was immaterial, and the note was properly admitted in evidence, and the rule must be discharged.

Rule discharged.

Charles H. Downing, Esq., for defendant.

Joseph M. Pile, Esq., for plaintiff.

[Leg. Int., Vol. 32, p. 248.]

MCGOVERN vs. BOCKIUS.

The provision of a railroad contract that the decision of the engineer shall be final and conclusive in any dispute which may arise between the parties relative to or touching the same, does not include within its terms of submission damages happening to the plaintiff from a rescission of the contract.

Sur rule for new trial. Opinion delivered July 3, 1875, by

ELCOCK, J.—The contract between plaintiff and defendant was for the grading, tunneling, etc., by plaintiff, of Section No. 4 of the Union Railroad Coal and Iron Company, in Schuylkill county. The plaintiff's claim was of a twofold character, first for work actually performed, measured and certified to by the chief engineer of the company, under the terms of the contract; second, for damages resulting from the stoppage of the work, and rescission of the contract on the part of the defendant. The first part of the claim was not disputed; the contest is as to the latter. The plaintiff alleged and proved that, being ready and willing to perform his contract, having, in fact, performed work to the amount of about ten thousand dollars under the contract, and having expended large sums for horses, carts, tools, houses, stables, etc., the work on the whole line of the road was stopped by defendant about two months after its commencement, and the contract annulled. The plaintiff's claim, therefore, under the rule laid down in *Railroad Company vs. Howard*, 13 Howard, p. 330, and *Turner vs. Gareed*, 21 P. F. Smith,

56, was for the loss of his contract. This claim was resisted by defendant, upon the ground that the contract contained a condition precedent that the chief engineer of the road should alone award the damages.

The following is the clause referred to: "And it is mutually agreed and distinctly understood that the decision of the said chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, *relative to or touching the same*; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy, in law or otherwise, *by virtue of said contract*, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The contract contains no language or condition in reference to stoppage of the work or a rescission of the contract; the submission to the engineer is of all questions *relative to or touching the covenants of the agreement*. The waiver of right of action is of questions raised *by virtue of said covenants*. Damages resulting from loss of the contract or bargain are clearly not within the rule of submission to the engineer. The clause of the agreement referred to is one usually inserted in railroad contracts, and its construction upon the question of work done under the agreement has been determined in *Reynolds vs. Caldwell*, 1 P. F. S. 298; *Monongahela Navigation Company vs. Fenlon*, 4 W. & S. 205; *Faunce vs. Burke*, 4 Harris, 480, and numerous other cases, but the question here presented has not been raised in Pennsylvania, in any reported case.

In *Dubois vs. The Delaware & Hudson Canal Company*, 12 Wendell, 334, where by the contract it was stipulated that the engineer selected by the canal company should estimate the value of any extra work caused by an alteration of the line of the canal, and determine every other question necessary to the adjustment and final settlement of the contract—his decision to be final and conclusive between the parties—it was held (inasmuch as the claim of the contractor for compensation for the excavation of hard pan could not be enforced under the contract, and his remedy was only by action founded on a *quantum meruit*), that the estimate of the engineer of the value of such work was not conclusive upon the contractor.

To take from a party his remedy at law, the language of the agreement of submission to arbitration must be undoubted and unequivocal, and the party setting up such an agreement must show clearly that the breach comes within the terms of the submission. In *Memphis Railroad Company vs. Wilcox*, 12 Wright, 161, it was decided that the estimates and decisions of an engineer of a railroad company are conclusive in disputes with contractors, only where such is the positive stipulation in the contract.

We cannot conceive that the language of this agreement contemplates that the estimate of the engineer should be given on the rescission of the contract. It would not be a natural interpretation of it. The duties of the engineer render his decision valuable and conclusive upon disputes as to the quantity, quality and kind of work, the change of route, and as to numerous questions relating to the construction of the road; and hence the stipulation in all railroad contracts making his decision final. This was to avoid litigation as to these very nice questions, which

are best determined upon the ground, but it was never intended that the engineer should usurp the province of the jury, and upon the rescission of the contract determine the contractor's damages for the loss of his bargain. It can hardly be supposed that a contractor would put this power in the hands of the company's engineer; at all events it should not be inferred from doubtful language in the agreement.

Rule discharged.

George M. Dallas, Esq., with whom was *William A. Marr, Esq.*, for plaintiff.

Hector T. Fenton and Furman Sheppard, Esqs., for defendant.

[Leg. Int., Vol. 32, p. 256.]

STEIN vs. RAILWAY COMPANY.

1. A father claiming under the act of April 15, 1851, as amended by act of April 26, 1845, for damages for the death of his son, claims in privity with the son.
2. The admissions of one person are evidence against another in privity with him.
3. Verbal declarations are properly admissible as part of the *res gesta* when they accompany some act, the nature, object, or motive of which is the subject of inquiry.
4. In an action by a father against a railway company for damages for the death of his son, the declaration of the son immediately after the happening of the accident, that he had jumped from the car, was admissible: 1st. As an admission against interest.
2d. As a part of the *res gesta*.

Sur rule for new trial. Opinion delivered July 3, 1875, by

ELCOCK, J.—This is an action by a father to recover damages for the loss of life of his son, occasioned as is alleged, by the negligence of the defendants, in permitting its street railway car to be so overcrowded by passengers, that the boy, aged eleven years and five months, was pushed by the crowd off the front platform of the car upon which he was riding, and under the wheels, which passed over his body, occasioning such severe injuries, that within a space of about forty-eight hours after the happening of the accident he died.

Upon the trial of the cause a witness named Joshua M. Poynts was called upon the part of the defendant, who testified that he was a police officer, that he accompanied the boy to St. Joseph's hospital immediately after the happening of the accident, and that after the wounds of the boy had been dressed by the surgeon, the witness asked the boy if he had been pushed off the car, when the boy replied, "No; my cousin frightened me, and I jumped off."

This testimony, if believed, was very important; its admission has been assigned by plaintiff as a reason for granting a new trial.

The plaintiff's right to bring this suit is claimed by virtue of the act of assembly of April 15, 1851, Purdon's Digest, p. 1093, which is in the following words:

1. "No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

2. "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life. the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

This act was amended by an act of April 26, 1855, Purdon's Digest, p. 1094, as follows:

"The persons entitled to recover damages for an injury causing death, shall be the husband, widow, children, or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take in his or her personal estate in case of intestacy, and that without liability to creditors."

These acts give the survivorship to the parent, as in case of intestacy, for the damages occasioned by the defendant's negligence to the decedent, for the injuries done to him, as well as to the parent. It is through the son, by virtue of his parentage, that plaintiff claims. This clearly constitutes father and son in this action in relationship, under the term known in the law as privies.

The admissions of one person are evidence against another in respect of privacy between them. The term *privacy* denotes mutual or successive relationship to the same rights of property; and privies are distributed into several classes, according to the manner of this relationship. Thus there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executors and testator, administrator and intestate; privies in law, where the law without privacy of blood or estate, casts the land upon another, as by escheats. All these are more generally classed into privies in estate, privies in blood, and privies in law. The ground upon which admissions bind those in privacy with the party making them is, that they are identified in interest.

The admissions are receivable in evidence against the representative in the same manner as they would have been against the party represented: 1 Greenleaf on Evidence, § 189.

This admission or declaration is also admissible in evidence upon the ground that it was part of the *res gestæ*.

In *Enos vs. Tuttle*, 3 Conn. 250, the rule is concisely laid down as follows—

"Declarations, to become part of the *res gestæ*, must have been made at the time of the act done which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize with them as obviously to constitute one transaction."

There the admission or declaration was made upon the same day, an hour or two after the accident occurred, and is as to the direct cause of the accident, unfolding the real points in issue, viz., the question as to the defendant's negligence.

Analogy can be found in numerous cases. In *Hadley vs. Carter*, 8 N. H. 40, in a suit for enticing away a servant, his declarations at the time of leaving his master were admissible as part of the *res gestæ*, to show the motive of his departure.

In *Dobb vs. The Justices*, 17 Geo. 624, the acts and sayings of a constable at the time of a levy are admissible as part of the *res gestæ*, in an action against the sureties on his bond for neglecting to make a return thereof.

In *Galena Railroad vs. Fay*, 16 Ill. 558, the conduct and exclamations of passengers on a railroad at the time of an accident, though not in the

presence of the party receiving an injury, are admissible as part of the *res gestæ*, to justify the conduct of the party injured.

So in the question of pedigree in *Shields vs. Boucher*, 1 De G. & Smal., p. 40, the doctrine has been thought to warrant the admission of declarations made by a deceased person, as to where his family came from, where he came from, and of what place his father was designated.

So in *Gibblehouse vs. Strong*, 3 Rawle, 437, the declarations of a person while holding the legal title to an estate, that he was merely a trustee for another, who had paid the purchase-money, are admissible in evidence against those claiming under him, although he be capable at the time of being examined as a witness.

So on the trial of Lord George Gordon, Howell's State Trials, the cries of the mob were allowed to be given in evidence.

Had the boy in this case survived and brought an action this admission would be fatal to his recovery. No reason can be assigned why an admission fatal to the decedent should not be fatal to his representative. Indeed, in many cases, admissions of similar nature have been regarded as evidence, irrespective of the question of *res gestæ*.

The earliest case, and one which has been cited with approval by text writers, and by the courts of New York and Massachusetts, is *Aveson vs. Lord Kinnard*, 6 East. 188, which was an action by the husband upon a policy of insurance on the life of his wife, and there the declarations by the wife, made by her when lying in bed, apparently ill, stating the bad state of her health at the period of her going to M. (whither she went a few days before, in order to be examined by a surgeon, and to get a certificate from him of good health preparatory to making the insurance), down to that time, and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible in evidence to show her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to M. and the day on which such declarations were made.

So in *Steele vs. Thompson*, 3 Penrose & Watts, 34, a like principle was affirmed, the case being where the husband was sought for at his own house, for the purpose of making a tender to him, and his wife refused to give information where he could be found, and declared that her husband would not accept the tender, such declarations were given in evidence.

In *Walton vs. Green*, 1 C. & P. 621, a husband in defending an action against him for board, etc., of his wife, may show her declaration confessing adultery made immediately before he turned her off, and also letters from men found about that time in her desk.

In *Gilchrist vs. Bale*, 8 Watts, 355, in an action for enticing away the plaintiff's wife, the declarations of the wife made immediately before or at the time she left her husband, of his cruel treatment of her, are competent evidence for the defendant.

Verbal declarations, therefore, are properly admissible as part of the *res gestæ* when they accompany some act, the nature, object or motive of which is the subject of inquiry, on the ground that what is said at the time affords legitimate, if not the best means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords.

It must follow in natural reason that as in all cases where the acts of the party, who, at the time of the occurrence, has a right of action, can be given in evidence, so may his admissions or declarations made at the same time touching the reasons for his actions or conduct. At the time of this occurrence the right of action existed in the boy, and continued until his death, when his father became by law his representative.

The conduct or action of the boy was the important subject of inquiry. His actions were evidence, why not his mental feelings, his convictions, his reason for the cause of this accident, and his own conduct? Surely it would be excluding the light from the investigation, to say that declarations of the principal actor at the time of and forming part of the occurrence are not pertinent because of his death. This has in it no element of hearsay testimony; and to so rule would be complicating the rules of evidence and restricting inquiry leading to justice.

We are clearly of opinion that the evidence was properly admitted, and as we see no error in the other reasons filed, the rule for a new trial is discharged.

Rule discharged.

Gustavus Remak, Esq., for plaintiff.

J. H. Gendell and *E. Spencer Miller*, Esqs., for defendants.

[*Leg. Int.*, Vol. 32, p. 396.]

CAMPBELL *vs.* TAGGART *et al.*

An injunction will not lie to restrain the exercise of a public office. *Quo warranto* is the remedy.

Opinion delivered October 30, 1875, by

THAYER, P. J.—This is a bill brought by a retail coal dealer against William H. Taggart, Joseph Moore and Charles J. McAllister, to restrain them by injunction from exercising the duties and powers conferred by the act of May 27, 1871, entitled, "An act to regulate the weight of anthracite coal delivered by retail dealers in the city of Philadelphia." Article 3, section 27, of the constitution ordains that "No State office shall be continued or created for the inspection or measuring of any merchandise, manufacture or commodity, but any county or municipality may appoint such officers when authorized by law." The complainant alleges that the defendants are State officers for the measuring of coal; that their office is abolished by the constitution, and that they ought, consequently, to be restrained from any further exercise of their functions. The defendants deny that by a true construction of the act they are State officers for the measuring of coal, but insist that they are only inspectors of the capacity of carts in which the coal is carried, and that their office is analogous to that of the sealers of weights and measures. There are two fundamental objections to the bill. In the first place, it alleges no special injury to the plaintiff, and courts of equity will not decide public questions at the instance of private parties who have no interest in the question beyond that which the public in general have.

It is not charged that the defendants are about to commit any wrongful or injurious act, which will specially affect the complainant, but only that they "are continuing to stamp carts and other vehicles used in retailing coal in the city of Philadelphia, and to receive the fees therefor, and to exercise all the powers and perform all the duties appertaining

to the said offices of inspectors." The only object of the bill would seem to be to determine the right of the defendants to exercise a public office, but private parties can invoke the chancery powers of the courts only for the redress of private injuries done or threatened. When equity intervenes to restrain acts prejudicial to the interests of the community, it must be by bill by the attorney-general: *Sparhawk vs. Union Passenger Railway Company*, 4 Smith, 401.

In the second place, the proper proceeding to determine the right to exercise a public office is by writ of *quo warranto*, and not by a bill for an injunction: *Updegraff vs. Crans*, 11 Wright, 103. We express no opinion on the question which the complainant has sought to raise by his bill. Upon both grounds the bill must be dismissed.

Bill dismissed.

W. H. Ruddiman, Esq., for plaintiff.

T. J. Barger and C. H. Gross, Esqs., for defendant.

[Leg. Int., Vol. 32, p. 412.]

SHAW vs. KENATH.

A summons returned *nihil habet*, and an alias served, constitute but one case, and a *fi. fa.* issued under the term and number of the original is not improper.

A *fi. fa.* and attachment execution may both issue and be pursued at the same time, and plaintiff will not be compelled to elect upon which he will proceed, unless property is seized under either sufficient to pay the judgment.

Sur rule to set aside *fi. fa.* Opinion delivered November 12, 1875, by ELCOCK, J.—On October 31, 1874, a summons was issued in this case and returned "*nihil habet*." On November 23, 1874, an alias summons issued returned "served." A copy of book account was filed in the original suit, judgment obtained for want of an affidavit of defence under the second writ, and on January 8, 1875, an attachment execution issued and was duly served upon Henry J. Devenney as garnishee. The garnishee has made answer that no property is in his hands of defendant's, and upon October 7, 1875, a *fi. fa.* issued as under the original writ. Defendant now moves to set aside the *fi. fa.* for the reasons: I. That it cannot issue under the writ on which there is no judgment; and, II. There being an outstanding attachment, the plaintiff is compelled to elect upon which execution he shall proceed.

Where a summons is not served and an alias issues, all the proceedings relate back to the original writ and form but one case. The alias is a continuance of the original writ. The running of the statute of limitations is saved by the original writ, and stay of execution dates from the return day of the original: *McClurg vs. Fryer*, 3 Harris, 293. There is, therefore, nothing improper in the mode in which the *fi. fa.* issued, the judgment being founded upon both writs. Because the *fi. fa.* bears a reference to the term and number of the original writ, would be no ground to set it aside, there being a judgment to support it in the same case.

As many forms of execution may be issued as the law will afford, and they may all be pursued at the same time until satisfaction be obtained. The doctrine of compelling the plaintiff to elect upon which execution he would proceed arose from the practice prior to the act of July 12,

1842, abolishing imprisonments for debt, of issuing a *ca. sa.* and *fi. fa.* together. When a levy then was made under the *fi. fa.* the defendant could not be imprisoned under the *ca. sa.* until it was ascertained if satisfaction could be obtained under the *fi. fa.*; or in the event of proceeding under the *ca. sa.* first, the defendant could be released on pointing out property upon which a levy could be made under the *fi. fa.* The practice has of late years been to issue *fi. fa.* and attachment execution at the same time, and proceed upon both. When property has been levied upon under either, sufficient to satisfy the judgment, defendant could, on application to the court, in a proper case, compel plaintiff to elect upon which he would proceed.

Attachment executions are collateral processes to the regular actions between the parties for the same debt or duty, and are not incompatible with them, except so far as they actually interfere in their enforcement, or endanger the rights of some of the parties. As collateral processes they are under the control of the court, as in other cases, when several remedies are employed for the same debt or injury. As an execution, this particular process is under the control of the court, so far as to see that it is not used vexatiously: *Kase vs. Kase*, 10 Casey, 128. The *fi. fa.* is not inconsistent with an attachment execution, unless the attachment seizes some property of the defendant in the hands of the garnishee. It remains as an outstanding execution, but where nothing is attached, it is practically an unexecuted writ. See *Tams vs. Wardle*, 5 W. & S. 222; *Newlin vs. Scott*, 2 Casey, 102; *Pontius vs. Nesbit*, 4 Wr. 309.

Where either writ seizes property adequate to satisfy the judgment, we will compel an election, but as no such position can be assumed in this case, this rule is discharged.

Rule discharged.

J. Warren Coulston, Esq., for plaintiff.

George P. Rich, Esq., for defendant and the rule.

[Leg. Int., Vol. 32, p. 412.]

THE COMMONWEALTH OF PENNSYLVANIA *ex rel.* MORTON McMICHAEL *et al.*, Commissioners of Fairmount Park, *vs.* WILLIAM K. PARK *et al.*, members of the Select and Common Councils of the city of Philadelphia.

1. A mandamus will not lie to compel the performance of an act by a person clothed with a discretion to determine the necessity of such act, and the time and circumstances which call for its performance.
2. Under the acts of assembly relating to Fairmount park the city councils alone are authorized to determine when city loans shall be issued for the permanent improvement of the park.

Opinion delivered November 16, 1875, by

THAYER, P. J.—The substantial question raised by the pleadings in this case, and that which must determine the right of the relators to a peremptory writ of mandamus, is, whether the select and common councils of the city are bound, upon the requisition of the park commissioners, to vote for an ordinance authorizing the creation of a city loan to raise money to be expended in the permanent improvement of the park.

That the relators are entitled to this remedy, and that the city councils and all other municipal officers and agents are amenable to it in cases

where a clearly defined duty is imposed upon them by law, and which duty does not in any way depend for its exercise upon official discretion, has been often determined, and is too clear to admit of the least doubt. Where a ministerial act is to be done, and there is no other specific remedy, a mandamus will lie to compel the performance of the act required. It is equally well settled, that where the complaint is against a person acting in a judicial or deliberative capacity, or against a person who has a discretion to do or not to do the act, according to the dictates of his own judgment, such person cannot be coerced by a writ of mandamus. He may be ordered to do his duty according to the best of his judgment, but the court will not direct him in what manner to decide or how he shall discharge his duty. The use of the writ of mandamus is to enforce obedience of officers who either will not exercise their deliberative power and discretion at all, or who have no such power to exercise, but decline doing a mere ministerial act. It is never used to control the deliberation or coerce the discretion of official bodies or individuals: *Com. ex rel. vs. Cochran*, 5 Binney, 87; 1 Serg. & R. 187. If a person is required by law to do a particular act, but the time and manner of doing it are dependent upon his discretion, he may be ordered by a writ of mandamus to do the act, but the court will not control his discretion as to the time and manner of doing it: *Phillips vs. Bury*, 1 Ld. Ray, 5; *The King vs. The Bristol Dock Company*, 6 B. & C. 181. The rule is without exception that where there is a discretionary power vested in officers, the court will not interfere by mandamus, for they cannot and ought not to control them in the exercise of it. The present question is thus brought within a very narrow compass and depends upon the construction which is to be placed upon the several acts of assembly relating to the subject.

The argument for the relators is built upon the construction which they maintain ought to be given to the 11th section of the act of April 14, 1868, which is a supplement to the original act of 1867, establishing Fairmount park. By that section it is enacted that "the city of Philadelphia shall be authorized and required to raise by loans, from time to time, such sums of money as shall be necessary to make compensation for all grounds heretofore taken or to be taken for said Fairmount park, and for the laying out and construction thereof for public use, for the permanent care and improvement thereof, and for all culverts and other means for preserving the Schuylkill water pure for the use of the citizens of said city, and shall annually assess taxes for keeping in repair and good order the said park, and shall also provide for the payment of the interest on all said loans, and the usual sinking fund for the redemption thereof." It is insisted that the word "required" used in this section imposes upon councils an imperative duty to create loans for the improvement of the park, and that this duty is not qualified by any discretion. But when and how often are these loans to be created? This question is answered by the words of the act, "from time to time, as they shall be necessary to make compensation for all grounds heretofore taken or to be taken for said Fairmount park, and for the laying out and construction thereof for public use, and for permanent care and improvement thereof, and for all culverts and other means of preserving the Schuylkill water pure for the use of the citizens of said city." But who is to

be the judge of the necessity for raising money for these purposes? So far as it is required for the purpose of making compensation for grounds taken, the city is obliged to raise the money by loans when the land is taken. When the lands have been taken a *mandamus* would clearly lie to compel the councils to raise the money to pay for them. But the lands cannot be taken except by an ordinance of councils. This clearly appears by the 6th section of the original act of March 26, 1867, which is not altered or repealed by any of the subsequent acts. That section enacts that "the commissioners of said park are hereby empowered, whenever the councils of the city of Philadelphia shall so declare by ordinance, to take such other land as may be deemed proper by said councils, for the extension of said Fairmount park," between certain limits.

The lands which were to be added to the park, so far as they were not indicated in the acts themselves by the Legislature, could only be taken with the consent of councils.

Thus the same authority which was required to pay for the lands with money raised by loans was clothed with authority to decide in the first place whether the lands should be taken. How far then the debt of the city should be increased by the taking of lands other than those specifically directed by the Legislature to be taken, was left entirely to the discretion of the city councils. So much for the obligation imposed upon the city to create loans for the payment of land damages.

We come then to the second object enumerated in the eleventh section for which loans are required to be created, viz.: the construction and permanent improvement of the park. Who is to be the judge of what loans are necessary for these purposes? Are the park commissioners the judges of this necessity? If so, then it follows as a corollary from this proposition that the city is bound to create loans whenever the commissioners may call for them, and for any amount they may call for; that a power to increase indefinitely the debt of the city is vested in the commissioners; and that the city councils, who are the immediate representatives of the people and directly responsible to them for any abuse of power or mismanagement of their affairs, have no control over the city debt or the amount of taxation to be imposed for its liquidation. This is a great power to claim. It is in derogation of the ordinary methods of administering municipal government in a republican country, and most dangerous in its tendencies.

If such a power has been delegated to the commissioners by the Legislature, we may not, perhaps, gainsay it, as it was said by a high authority in *Philadelphia vs. Fox*, 14 Smith, 169, that the Legislature may take into its own hands the appointment of all the city officers and agents, "for the power which can create and destroy can modify and change."

Nevertheless, when such a power is claimed we are entitled to ask those who claim it to point out the words which contain the grant. If they cannot be pointed out, the power does not exist, for it is too plain for argument that such a power is not to be found, unless it has been given in express words, or by an implication so clear, so strong, so necessary, and so unavoidable that it possesses all the force of a grant in express words. Now, we shall look in vain through the ten acts of assembly which relate to the park for any such grant, either in express words or by necessary implication. The park commissioners

have very large powers. To them is wisely committed the entire government, care, and management of the park, the appointment of all officers, agents and subordinates, the making of all rules and regulations, the vacation and opening of roads and streets in the park, the licensing of passenger railways therein, the employment of a police force, the control of all the property within the park limits, the construction of all works and improvements, and the expenditure of all moneys for the improvement and maintenance of the park. But these expenditures are, by the express words of the act of March 26, 1867 (which is not repealed by any subsequent act), to be "subject to such appropriations as councils shall from time to time make," section 5. Moreover, it is expressly provided by the fourth section of the same act, that "no contract shall be made for the improvement of the park unless an appropriation therefor shall have been first made by the councils of said city;" and by the 14th section of the act of April 14, 1868, and the 14th section of the act of January 27, 1870, they are required to make an annual report to councils of their proceedings, and a statement of the manner in which the money appropriated by councils has been expended. All these laws will be explored in vain in the search for any authority given to the commissioners to make requisitions upon councils for loans, or to prescribe the time, the occasion, the amount or the conditions of such loans. They are to disburse all moneys which are appropriated. The expenditures are to be under their exclusive control, but the raising and appropriation of the money, and the power to order or negotiate loans is not given to them. If the intention of the Legislature is to be derived from inference and conjecture, which, however, is to slender a foundation to support so large a power, it is, nevertheless, impossible to suppose that it was intended to give the commissioners an unlimited power to call for loans when their expenditures are limited to appropriations actually made by councils, and they are forbidden to enter into any contract without a previous appropriation made therefor. It would be most unreasonable to infer so large a power when smaller ones are withheld, and those which are given are circumscribed with conditions and limitations which evince a plain purpose that the city shall retain the control over a subject so material to its welfare and prosperity.

If, then, the commissioners are not made the judges of the necessity which exists for loans, and if they have no power to make a binding requisition upon councils for such loans, the question originally stated recurs: Who is to determine this necessity? It was suggested upon the argument, that if the commissioners have no such power, and if the councils deny the necessity for the particular loan of one million of dollars, which is asked for, and which the commissioners allege to be necessary, then the fact may be tried by common law forms—that is, by jury. It would be a singular, and, we apprehend, an unforeseen result of this legislation, as well as a strange and monstrous anomaly in municipal government, if it should be left to twelve men, taken by lot from the jury-wheel of this city, to determine whether a debt of a million of dollars should be incurred by the municipality. It would be better, and safer and wiser, than this to overleap at a bound all difficulties and opposing considerations, and to give to the commissioners the unlimited powers which the acts of assembly have denied them.

What, then, is the true import of the words of the 11th section?—"the city of Philadelphia shall be authorized and required to raise by loans, from time to time, such sums of money as shall be necessary" for the permanent improvement of the park. Certainly they do more than confer an authority. They impose an obligation. But what kind of an obligation? Not that kind of obligation which is so precise in its terms, and so well defined in its character that the performance of it is a mere ministerial function, but an obligation which from the very terms in which it is imposed is, *ex necessitate*, coupled with a discretion, which they alone can exercise who are to discharge the obligation. There must be discretion as to the time, as to the amount, as to the necessity, and as to the terms and conditions of the loan. A discretion which must also embrace within its vision the financial condition and prospects of the city. We have already seen that this discretion is not lodged with any other body or with any other individuals. It follows as an irresistible conclusion, that it must reside with those upon whom the obligation is imposed, and such an obligation we have also seen cannot be enforced by the writ of mandamus, for coercion would destroy the discretion.

Here the argument might end. But there are other considerations which confirm the conclusion arrived at. The 39th section of the consolidation act (February 2, 1854, P. L., p. 43) enacts that "no loan shall be authorized without a vote of two-thirds of the whole number of the members of each council." In like manner, the act of May 23, 1874 (P. L. 234), authorizing the city to increase its debt one per centum upon the assessed value of its taxable property (without which act no new loan could be made, the limit prescribed in the 8th section of the 9th article of the Constitution having been already reached), declares that "no loan shall be authorized without a vote of two-thirds of the whole number of members of each council." Now it is plain that to require a two-thirds vote to pass a loan bill, necessarily implies that those who are to vote upon the measure are to exercise, each one for himself, a discretion as to how he shall vote. It means that the opinion and judgment of two-thirds of the members must concur in the wisdom and expediency of the proposed measure. But how can these acts of assembly, and this liberty of action, which is guaranteed by them, be maintained if the members are coerced by *mandamus*? Thus, whether we consider the acts relating to the park, the general legislation relating to the city, or the principles and policy which are usually applied to municipal government, the conclusion reached is, that the members of the city councils are to act upon their individual judgments in voting upon the pending loan bill, and that their official action can neither be challenged nor directed by legal proceedings.

We have considered the question presented to us purely as a question of law. We are not at liberty to look upon it in any other light. It may be that the judgment of the commissioners, in regard to the necessity of a loan at the present time, is a correct judgment. Their opinion is certainly entitled to great respect. They are gentlemen of the highest character, possessing the entire confidence of the public. They administer a great, most beneficial, and important trust, without reward or compensation. They have no personal interest to subserve, and can

be influenced by no motives except those which arise out of a proper and honorable discharge of their public duties, and a desire to promote the welfare of their fellow-citizens. It may be that they are right in supposing that the means should be supplied to place the park in a condition which will be creditable to the city at a time when it is to be visited by so many hundreds of thousands of strangers from all parts of the country and from foreign lands. It may be that the minority, which refuses to vote for the loan for which the commissioners have asked, err in their judgments and misapprehend their duty, or refuse obstinately to perform it. If so, they must be left to the judgment of their constituents. The only remedy lies with them. These are considerations with which, if they are true, we have no concern. Our duty is only to decide the question before us. Upon that question the court is unanimously of the opinion that the law requires that the defendants be left to the free and uncontrolled exercise of their own discretion; that they are at liberty to vote as they see fit upon the proposed measure, and that we have no power to inquire into their motives, or to interfere in any manner with the discharge of their duty.

Judgment for the defendants upon the demurrer to the return.

W. H. Yerkes, Esq., for the park commissioners.

C. H. T. Collis and Robert N. Willson, Esqs., for city council.

[Leg. Int., Vol. 32, p. 420.]

DILLON vs. CONOVER.

Where a claimant in a sheriff's interpleader files a narr within fourteen days, as required by the rule of court, but neglects to give the bond, the court, on motion, will order the sheriff to sell and pay the proceeds of the sale into court to abide the determination of the issue.

Rule to stay the rule to plead. Opinion delivered *November 20, 1875*, by

THAYER, P. J.—In this case a *fi. fa.* was issued and a levy made. One Morton intervened and claimed the goods. The sheriff took the usual rule to interplead, which was made absolute. The claimant within the fourteen days prescribed by rule 17, filed his narr, but has given no bond. The plaintiff in the execution having been ruled to plead by the claimant, has taken the present rule, insisting that the claimant has no right to an issue unless he gives the bond. The point made by the plaintiff was settled in the District Court very soon after the passage of the sheriff's interpleader act, as may be seen by reference to the cases of *Rump vs. Williams* and *Jacobs vs. Wells*, which are reported in 1 Troubat & Haly's Practice, pp. 725, 726 (third edition); pages 905 and 906 (fourth edition, by Fish, where see Judge Sharswood's opinion in notes). In these cases it was declared that if the claimant files the narr but neglects to give the bond, the court, on motion, will order the sheriff to proceed and sell, and pay the proceeds of the sale into court, to abide the determination of the issue. This is a very just and equitable practice, and we see no reason why we should depart from it. Cases may arise in which the claimant is unable to give the required security. He cannot, under such circumstances, retain possession of the goods, but he ought, nevertheless, to have an opportunity to prove his owner-

ship, and, if he succeeds, to take the proceeds of the sale as the equivalent of the goods. The present rule must therefore be discharged.

Rule discharged.

[Leg. Int., Vol. 32, p. 456.]

COMMONWEALTH OF PENNSYLVANIA *ex relatione* The Pennsylvania Society for the Prevention of Cruelty to Animals *vs.* THOMAS RANDALL, Magistrate of Police Court No. 24.

Penalties collected by magistrates under act March 29, 1869, are payable into the county treasury, under the 13th section of Article V. Constitution of 1873.

Rule for an alternative mandamus. Opinion delivered *December 22, 1875*, by

THAYER, P. J.—The object of this proceeding is to compel the defendant who, as one of the police magistrates of the city, has collected a penalty of \$10 for a violation of the act of March 29, 1869, for the punishment of cruelty to animals (P. L., p. 22), to pay the same to the Society for the Prevention of Cruelty to Animals. By the act of June 2, 1871 (P. L. 290), it is enacted that "all fines and penalties imposed by any alderman or magistrate under the act of March 29, 1869, shall be payable to the Society for the Prevention of Cruelty to Animals." The 13th section of the 5th article of the new constitution, requires that all fees, fines and penalties in the police and magisterial courts, established by the 19th section of the same article, "shall be paid into the county treasury." It is argued that this provision was only intended to apply to fines and penalties which, at the time the new constitution was ordained, were payable to the State, and that it was not intended to repeal the provision in the act of June 2, 1871, or any of the various acts by which fines and penalties, or a portion of them, were payable to the informer. The language of the constitution is so express, comprehensive and unqualified, that no room seems to be left for interpretation. When the constitution says "*all* fines and penalties" collected in these courts shall be paid into the county treasury, we cannot interpolate any exception which is not found in the instrument itself. We may conjecture that the present case was not in the mind of the framers, but we cannot certainly say it was not. Nor can we break through the express words of the constitution without some better warrant than a mere conjecture. It is a settled rule of construction that in the absence of ambiguity no exposition shall be made, which is opposed to the express words of the instrument, *a verbis legis non est recedendum*. A court of law will not make any interpretation contrary to the express letter of such an instrument, for nothing can so well explain the meaning of the makers as their own direct words, since *index animi sermo* and *maledicta expositio quæ corrumpit textum*; 4 Rep. 35. It would be dangerous to give scope for making a construction in any case against the express words, where there is nothing to assure us that the meaning of the makers is opposed to them.

Rule discharged.

Court of Common Pleas of Forest County.

[Leg. Int., Vol. 31, p. 309.]

FIRST NATIONAL BANK OF CORRY vs. L. & M. CHILDS

Mechanics, miners, laborers, and others claiming under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property; in default of this notice, no lien. Construction of said act and its requirements.

Sur-exceptions to auditor's report. Opinion delivered by

WETMORE, P. J.—At common law, a lien on personal property consists in a mere right to retain possession until the debt or charge is paid. Thus liens generally arise from bailment, are founded on usage, and only have force and validity while the goods are in possession of the bailor. The ordinary cases of liens are factors, innkeepers, warehousemen, common carriers, etc. In all these cases, in order to create a lien, there must be a delivery of the property. It must come into the possession of the party claiming the lien, or his agent.

The ordinary understanding of a lien on personal property, is the right to detain the property in possession till the claim or charge constituting the lien is satisfied. By the first section of the act of the 9th of April, 1872, entitled "An act for the better protection of the wages of mechanics, miners, laborers and others," Pamphlet Laws, 1872, pages 47 and 48, it is provided that the wages of labor, not exceeding six months immediately preceding the sale, and not exceeding two hundred dollars, shall be a lien, and shall be preferred and first paid out of the proceeds, etc. This part of the act only relates to personal property, as the claim, to be a lien on real estate, must be filed in the prothonotary's office.

The second section of the act provides that it shall be lawful for such laborers and others to give notice in writing of their claim or claims, and the amount thereof, to the officer executing the writ, at any time before the actual sale of the property levied on, and the officer shall pay out of the proceeds the amount which each laborer is justly and legally entitled to receive.

The statute creates a lien on personal property without any record, statement, or memorandum of the same filed or recorded in any place. No act on the part of the claimant is required to give it force, and no possession of the property on which the lien exists is necessary to give notice to creditors or vendees of its existence.

The remedy is the means employed to enforce a right. The only remedy provided in this act is contained in the second section, which says it shall be lawful for the claimant to give notice in writing of his claim and the amount thereof at any time before the actual sale of the property levied on. In proceedings at law the claim must be sued

within the time required, and the pleadings, trial, judgment and execution must be according to the legally established rule.

A claim giving a complete right of action is useless unless it is asserted according to the prescribed modes; the right can only be established and enforced according to the legal remedies. The first section of the act in giving time creates the lien, and the second section provides a time and way for the claimant to give notice of his claim.

The provisions of the second section were not complied with, and no notice given as therein provided; the claimants gave no notice until after the sheriff's sale.

As a rule of exposition, statutes are to be construed in reference to the principles of common law: Dwaris on Statutes, 185. Liens have been looked upon with jealousy, being considered as encroachments on the common law: Bouvier's Law Dictionary, 14th ed.; title "Liens," vol. 2, p. 47. The parties claiming the benefit of the lien given by the statute, should, therefore, have given notice in writing, as therein directed. The execution creditors, the sheriff, and lien claimants, would then know what there is against the property to be sold, and regulate their action accordingly. To sustain the claims in this case, permits a sale of property with secret liens against it, which the execution creditor has no means of ascertaining, and after the sale he is deprived of the fruits of his execution by awarding them to the claimants of the fund made by the sale.

The lien created by the statute is on the *property*, but the present claim is on the *fund* arising from its sale. To construe the statute with reference to the principles of common law so as to avoid secret liens at the time of the sheriff's sale, requires the claimant to give notice to the officer in writing, before the sale, of his claim and the amount thereof.

The report of the auditor is, therefore, reformed and corrected as follows: The item \$967.70 allowed to claims for labor is stricken out, and that amount of money is appropriated to *fi. fa.* No. 43, December Term, 1873. With this modification the report of the auditor is confirmed.

Court of Common Pleas of Bucks County.

[Leg. Int., Vol. 30, p. 86.]

LOVE vs. LOVE.

No decree of divorce can be pronounced by the courts of Pennsylvania which can affect the rights of the respondent, being a non-resident, and having no notice, and a decree under these circumstances, the notice merely being statutory, can have no extra-territorial effect, and is not conclusive upon the respondent.

Pluries subpoena sur divorce. Opinion delivered February 15, 1873, by

Ross, P. J.—The proceedings in this case are entirely *ex parte*. The respondent was not served, she never appeared, and in no stage of the proceedings has she ever participated, either in person, or by counsel.

It further appeared, and was conceded as a fact, upon the argument, that she is now living, and has, for eight or nine years, resided in St. Louis, Missouri.

Under these facts the first question that arises is, have we such jurisdiction over the person of the respondent, that we can, by constructive service upon her, in pursuance of the statute, by awarding alias and pluries writs of subpœna, consider her as a party in court to be bound by our decree?

The record shows the solemnization and consummation of a marriage between the libellant and respondent in this Commonwealth; and the alleged desertion also occurred in this State. The residence of the libellant has been here continuously; and it is earnestly insisted that this is the proper forum.

That it is so would seem to be unquestionable. It is well said by C. J. Gibson, in *Dorsey vs. Dorsey*, 7 Watts, 350: "It follows on our principle, however, that not only does jurisdiction belong to the courts of the place of the domicile, but that the retribution must be meted out by their measure. The forum is there, and the law, which declares the offence, is there also." Vide also *Colvin vs. Reed*, 5 P. F. S. 375; Story's Conflict of Laws, 230, 205, note 1; *McDermott's Appeal*, 8 W. & S. 256; *Hollister vs. Hollister*, 6 Barr, 451.

But all that these authorities demonstrate is, that as the parties were domiciled as husband and wife in Pennsylvania, and as the alleged desertion was effected within the Commonwealth, the courts of the State have jurisdiction over the *subject-matter*. The grave question still remains. Have we jurisdiction over the person of the respondent, she now being, and having, long before the subpœna issued, been a citizen of Missouri? In answering this inquiry it must not be forgotten that there has been no actual service upon her, that she has never appeared, and becomes a party here simply by virtue of the statutory provisions, authorizing proceedings upon alias writs of subpœna.

I am aware that decrees of divorce are almost daily being pronounced by the courts, where the parties are similarly situated; and I feel that in refusing to conform to this general practice, throughout the State, I am innovating upon action long assumed to be correct. It is seldom wise for a subordinate tribunal to depart from recognized usage; and it is still more dangerous for such judicatures to attempt to reform the law; but a careful and earnest consideration of the question presented by this record, has satisfied me, that the libellant is not placed, by the alias and pluries subpœna, in the attitude of a party before us; and, having neither been served, nor having notice, and not having participated in these proceedings, she is not subject to our decree, and cannot be affected by it.

If she were a citizen of this Commonwealth, she would be bound by our statute authorizing these proceedings, after alias writs of subpœna; and being subjected, by her citizenship, to our system of statutory regulation, could be affected by the constructive notice provided for by our acts regulating divorce.

But nine years ago she became a citizen of another State; and the question presented by this record is, whether a citizen of another State can be affected by a proceeding, of which he or she has no actual

notice? The genius of our system of jurisprudence, and its greatest boast is, that no one can be affected, in person or property, by judgment or decree, without notice. In *Dorsey vs. Dorsey*, supra, C. J. Gibson, in considering this subject said: "It is conclusive that the person of the transgressor was not subject to our jurisdiction at the time of the fact; for an attempt to bind him without it, or without hearing or notice, would be extravagant. Such appears to be the law deducible from the nature of our political system."

It is a well-settled principle of law, that where a State has no authority over the person of a defendant, the judgments rendered by its judicial tribunals, though conformable to its legislative enactments, can have no extra-territorial operation: Lewis, C. J., in *Rogers vs. Burns*, 3 Casey, 527. This doctrine was applied by the Supreme Court of this State in *Steel vs. Smith*, 7 W. & S. 451, where it was ruled, that in a State proceeding, according to the civil law, a judgment *in solido* against several, on a citation served only on one (the others residing out of its jurisdiction), is not entitled to credit elsewhere; and it was held, that even an appearance by an attorney, procured by such an assumption of authority, will not cure the defect arising from the want of jurisdiction. In the case last cited, C. J. Gibson says: "Though we have no decision of the Supreme Court of the United States, we have the authority of Mr. Justice Story (Com. on Const., § 1307) for saying, that though such a proceeding is put, in general terms, on the footing of a domestic judgment, it is open to inquiry, into the jurisdiction of the court to pronounce it, as well as into the right of the State to exercise AUTHORITY OVER THE PERSONS or the subject-matter; for which he refers to *Bessel vs. Briggs*, 9 Mass. 462; *Shumway vs. Stillman*, 4 Cow. 292; *Borden vs. Fitch*, 13 Johns. 121; "to which might be added, as of equal authority, our own decision, in *Benton vs. Burgol*, 10 Serg. & R. 240." Not to multiply authorities on a point so plain it will be sufficient to add the name of Mr. Burge, 1 Conf. 1, who says, "it is a fundamental principle, essential to the sovereignty of every independent State, that no municipal law, whatever its nature or object, should, *proprio vigore*, extend beyond the territory of the State by which it has been established." Following in the track of this clear and conclusive reasoning, it was ruled in *Warren Manufacturing Co. vs. Aetna Insurance Co.*, 2 Paine Rep. 502, that in order to sustain a judgment, the court must have had jurisdiction of the parties, as well as the subject-matter: vide also *Elliot vs. Piersol*, 1 Pet. 329; *Thompson vs. Tolmie*, 2 Pet. 157.

But the question would seem to be definitively ruled in *D'Arcy vs. Ketchum*, 11 How. 165, where it is ruled, that a judgment recovered against a non-resident *without notice*, is entitled to no faith or credit out of the State in which it was rendered. This ruling is followed, or sustained, in the case of *Sumner vs. Marcy*, 3 Woodbury & Minot, 105; 2 Paine, supra; *Lincoln vs. Tower*, 2 McL. 473; *Westerwelt vs. Lewis*, 2 Id. 511. So far has this principle been extended that it is ruled that in an action on the judgment of a court of another State, the defendant may plead, that he was not served with process in the jurisdiction: *Wilson vs. Graham*, 4 W. C. C. R. 53; 6 McL. 1; 2 McL. 473; Id. 511; 4 Id. 96.

It is clear then, that actual service, upon a non-resident, or his or her

appearance, is necessary to give jurisdiction; and it is equally clear that these requisites are not shown to exist, by this record.

But it is urged that, as the court has jurisdiction over the subject matter, the mere fact that one of the parties is a non-resident, and has not been served, she having had statutory notice, will not oust the jurisdiction as to her. The authorities cited demonstrate that this position cannot be sustained: *Steel vs. Smith*, 7 W. & S. 447; *Warren Manufacturing Company vs. Aina Insurance Company*, 2 Paine, 502; *D'Arcy vs. Ketchum*, 11 Howard, 165; *Rogers vs. Burns*, 3 Casey, 527.

Two requisites are essential to a jurisdiction which cannot be ousted: 1. Jurisdiction over the subject-matter. 2. Service upon a non-resident. That these requirements are requisite is abundantly demonstrated by the authorities cited.

But it is said, that the principle here invoked is destructive of the article in the federal compact, which provides that full faith and credit shall be given, in one State, to judgments rendered in another. But this is answered by a formidable array of cases, not only in our own State, but in the courts of the United States: *Smith vs. Lathrop*, 8 Wr. 326; *Wilson vs. Bank*, 9 Wr. 488; *Whittaker vs. Bramson*, 2 Paine's Rep. 209; *Renner vs. Marshall*, 1 Wheat. 215; *Wadleigh vs. Veazie*, 3 Sum. 165. As has been shown already, this has been carried so far, that in an action on a judgment recovered in the court of another State, the defendant may plead, that he was not served with process within the jurisdiction: 4 W. C. C. R. 53, and authorities already cited to that point.

But it is said, that upon this principle where the offending party has left the jurisdiction, and no service can be effected, the person injured is left without remedy, or so greatly inconvenienced, that a contrary doctrine must prevail. This argument can have no weight, when it is applied to overturn well-settled principles of law. It might be urged with force upon Congress to induce them to exercise a power, which, in wisdom, and the interests of public policy, should long since have been exerted, viz., the enactment of a national statute of divorce.

We rule, therefore, that no decree of divorce can be pronounced by this court which can affect the rights of the respondent (she being a non-resident, and having had no notice) in her marital relations; and that a decree divorcing her from the libellant, under the circumstances, the notice to her being merely statutory, could have no extra-territorial effect, and would not be conclusive upon her.

As I have said, this conclusion has been reached reluctantly; and we have declared it only, after making a careful and laborious examination of the authorities within our reach. The effect of a decree of divorce, if pronounced without authority, may be so ruinous to the future of others, may so materially affect the living, and those who may yet be begotten, that we cannot pronounce a decree dissolving the bonds of matrimony, unless we are satisfied, beyond a shadow of doubt, of our power to do so.

I am aware that this is going one step farther than the adjudicated cases in Pennsylvania have yet gone; but it is only the correlative of the proposition ruled in *Dorsey vs. Dorsey*, where it was held that there could be no jurisdiction, except in the courts of the domicile of the parties, at the time and place of the injury. All that is now decided is,

that where the respondent is a non-resident, she must be served, or have actual notice of the proceedings, if she is to be concluded by them; and we will not pronounce a decree until she is made a party. We further rule, that constructive notice, by virtue of a statutory enactment, gives our decree no extra-territorial effect; and we therefore refuse to decree a divorce *a vinculo*.

It is painfully evident, that greater strictness must characterize the actions of courts in relation to decrees of divorce. As was said by this court in *Ramsey vs. Ramsey*, 2 Book of Opinions, 341: "The shifting rules of evidence in the several States, varying with notions of legal reform, there prevalent, and the stages of progress in the various commonwealths; the varied character of protection and redress afforded by the statute law of the several States; the ease with which a new domicile may be acquired, by either party; and above all, the shameful facility by which divorces can be obtained in some of our sister commonwealths, require an adherence to these principles." It may be added, that safety, the descent of property, and individual decency, require, that where no service has been had, or notice given, no extra-territorial effect should be given, to decrees of divorce; and if we desire to protect our own citizens, the sound rules of law, invoked in this case, must be followed by the courts. If rigorously administered, an Indiana or Connecticut divorce would be a nullity; and the shameful local traffic in decrees of divorce would be innocuous.

A daily paper in the city of New York contains diurnally an advertisement that divorces are procured without publicity; and the ruling here, if generally adopted, would finally end such an abuse, as is suggested by its daily insertion.

I do not think that upon the merits a ground for divorce has been established by the testimony; but in order that our ruling may be submitted to the court of last resort, we refer this report to the examiner, to take further testimony upon the facts.

And now, February 15, 1873, the case is recommitted to the examiner, to take such further and other testimony as may be adduced before him, with directions to report at the next adjourned court.

H. Yerkes, Esq., pro libellant.

Court of Common Pleas of Chester County.

[Leg. Int., Vol. 30, p. 217.]

McVAUGH vs. McVAUGH.

A wife's choses in action do not vest in the husband at common law, unless he reduces them to possession.

The plaintiff was the wife of the defendant. Their marriage took place in the State of Delaware, in May, 1863, where she possessed personal property amounting to over six thousand dollars, consisting of choses in action. In the year 1865 the husband removed with his wife into Chester county, Pennsylvania, without reducing her choses to possession. Soon after the wife contracted for the purchase of a farm in said county of Chester, to be paid for from her property in Delaware.

When the conveyance was about to be made, the husband insisted upon having it in his own name, and refused to unite with her in releasing her debtors if this was not acceded to. To avoid a failure of the contract, the wife yielded, and the title was made to the husband. Soon after the husband deserted the wife, threatening to encumber the land. She then applied by bill to have him compelled to transfer the title to her, and enjoined from encumbering the property in the meantime.

In equity. Opinion delivered *January 6, 1873*, by

BUTLER, P. J.—It is conceded that the statute of Delaware relating to husband and wife does not apply to this case; that the marital rights of the parties, while domiciled in that State, depended upon the common law.

What, then, are the husband's rights under the common law in his wife's choses in action? In answering this question the distinction between her chattels in possession and choses in action must be kept in mind. The former vest in him immediately on marriage; while the latter remain in the wife, subject to a power in him to transfer them, by reduction to possession. It is optional with him whether he will or will not exercise the power; if he do not his death revokes it, and the right of the wife again becomes absolute. Even reduction to possession will not, under all circumstances, transfer the property to the husband; it must be in the assertion of his marital rights; if it appear to be otherwise, the property will continue in her.

Such is the common law of England, as it is understood and administered in this State: 2 Black. Com. 433; *Siter's Case*, 4 R. 468; *Skinner's Appeal*, 5 Barr, 262; *Dennison vs. Nigh*, 2 W. 90; *Robinson vs. Woelpper*, 1 Wh. 179; *Mellinger vs. Bausman*, 9 Wright, 522.

The husband, it is thus seen, has no vested fixed interest in the property involved in such choses. His right consists of a power to divest his wife—a power liable to be revoked by his death or by statute, and to be waived or forfeited by his acts.

The Supreme Court, therefore, held that the statute of 1848 did revoke it, whenever the power had not previously been exercised: *Mellinger vs. Bausman*, 9 Wr. 522. In Mississippi the Court of Appeals decided the same thing on the question arising there, under a similar statute: *Clarke vs. McCreary*, 12 S. & M. 347. The Legislature cannot take away a vested right in property; cannot give to the wife what the law has previously transferred to the husband. But while fully recognizing this, the courts, in the instances cited, denied that the husband had such vested right in the property of his wife's choses in action.

Applying these principles to the question before us, its solution does not seem difficult. The defendant, in Delaware, was clothed with a power to transfer his wife's choses to himself. He did not exercise it, but removed with her to this State, fixing his domicile here. The situs of their personal property accompanied them; the effect was precisely the same as if they had brought it along. Thereafter, it, as well as themselves, were subject to the laws of this State. The Legislature might, therefore, revoke his power. And it did so by means of the act of 1848, the moment the parties and their property became subject to its jurisdiction. The right of the wife again became absolute, as it had been

before the marriage. The circumstance that the power accrued to the husband while domiciled in *another State*, is unimportant; it is no more sacred than such a power arising under the common law here.

But it is asserted that the common law (relating to this subject) is *differently understood and administered in Delaware*; that the *property* in the wife's choses in action there *vests* in the husband *on marriage*. If this be so, the plaintiff has no case; for, marriage being a civil contract, whatever property accrued to the defendant upon his marriage there, will continue to be his wherever he may go. But we have not found anything to justify the assertion that the common law is so understood and administered in Delaware. It is true, creditors are there admitted to the rights of the husband, by means of attachment, and allowed to exercise his power of reducing the *choses* of the wife to possession. And in this, it is also true, they have differed from us: *Robinson vs. Woelpper*, 1 Wh. 179; *Dennison vs. Nigh*, 2 W. 90. Still they have but followed the rule in bankruptcy—a rule always difficult to reconcile with reason and justice—of which Ch. J. Gibson says (in *Siter's Case*, 4 R. 480): "The spirit is not justice. The object being to encourage trade by procuring payment of mercantile debts out of any fund within the bankrupt's control, without regard to the interests of others, these laws are deaf to the claims of his family in respect to interests which he has even a naked power to control. . . . Notwithstanding the assignment is not the act of the husband, but of third persons, it was held to be *ipso facto* a divestiture of the wife's title, as if it were the husband's own act, and a spontaneous exercise of his power. On abstract principles it might have seemed that though the power is a valuable one, yet the exercise of it pertains by its nature and origin to his individual volition, and not to the volition of his creditors or their representatives, who have no moral or expressly legal right to require him to despoil his wife for their benefit. The palpable injustice of these decisions induced Sir William Grant, in *Miford vs. Miford*, to depart from them to a certain extent; not, however, to take his stand upon principle, and entirely protect the title of the wife, as it seems to me he should have done, but to take a middle course, and allow the assignment to pass the incidental right of reduction into possession, as the husband had it subject to the same limitation as to time in the exercise of it." It is this rule which the court of Delaware has followed in *Johnson vs. Fleetwood*, 2 Harrington. The language used by the judge is very broad, as, that "the rights of the wife by contract immediately become the rights of the husband;" "her *choses* in action *vest* in him on marriage;" "he at once acquires a qualified *property* in her *choses*," etc. But the citations of authority show quite plainly, we think, that nothing more was intended to be expressed than the rule in bankruptcy, and the case required nothing more. Some reference is made to the cases in *outlawry*. But the part played by the crown in outlawry never arose much above that of a robber; and these cases have never been used as precedents for anything but the rule in bankruptcy. If it were true that the *property* in the wife's choses *vests* in the husband on marriage, it would necessarily go to his legal representatives on his death. It could not survive to his wife unless, indeed, his death be held to *divest* it, and the common law knew nothing of the kind. Such a view overlooks the distinction which has always existed

between the wife's choses in action and her chattels in possession; and if carried out would obliterate it.

It does not follow, therefore, from what has been decided in Delaware, that the courts of that State will hold the husband's rights in his wife's choses to be beyond the reach of legislative provision, *vested property*, of which he cannot be thus deprived.

The money with which the real estate was purchased was, therefore, the wife's; the conveyance must be treated as in trust for her, and the property secured against the improper acts of the husband.

The exception to the master's finding in regard to the personal property on the real estate was not pressed on the argument.

The plaintiff's solicitors will prepare and exhibit a decree.

Darlington and *Cornwell* for plaintiff.

Rees Davis and *Wayne MacVeagh, Esqs.*, for defendant.

Court of Common Pleas of Crawford County.

[Leg. Int., Vol. 30, p. 141.]

COMMONWEALTH vs. R. K. MOREY AND C. H. TAYLOR.

In criminal trials before justices of the peace with a jury of six, their records must show in some reasonably intelligible form a case within their jurisdiction, and that all the elements of a fair legal trial have been observed, and that a definite and authorized judgment has been entered.

A greater degree of precision is required in these criminal cases than in the ordinary civil cases that are tried before them.

The law gives them jurisdiction in cases of larceny where the value of the property stolen does not exceed \$10, and it is error if they try a case where the property appears to be of the value of "about \$10."

It is error if the property stolen be not charged to belong to some person, and if the place of the larceny be not stated.

It is error if it do not appear that the jurors are electors in the township, borough or city, where the trial takes place.

How the proceedings are to be made up and certified in return to a *certiorari*.

A *certiorari* in such cases cannot issue without a special allowance by the court or the district attorney.

In such cases the Christian name of the defendant ought to be given and not merely the initial letter, and so the jurors ought to be named.

On a charge of larceny against the defendants, made and tried before a justice of the peace, and brought up by the defendants by *certiorari*.

Opinion delivered April 8, 1873, by

LOWRIE, J.—This is a case of a complaint before a justice of the peace, against the defendants for stealing, and a trial and conviction by a jury of six, and a sentence thereon, and it is brought here by a *certiorari*. Many errors are assigned to the proceedings, and we proceed to consider such of them as are necessary to the proper trial of the case.

The acts of assembly under which this cause was tried are those of May 1, 1861, P. L. 682, and April 5, 1862, P. L. 274, extended to this county by that of April 1, 1863, P. L. 215, and it is these acts that we are called upon to interpret and apply to this case, and we shall endeavor to do it briefly and clearly.

1. It may be stated as a general principle that, in proceedings before justices of the peace, the law is not usually so exacting as to demand the

precision of form that is usual in the higher courts; it is satisfied if their records show, in some reasonably intelligible form, a case within their jurisdiction, and that all the elements of a fair legal trial of it have been observed, and that a definite and authorized judgment has been entered. Even where a form of proceeding and of recording it is partially or wholly prescribed by act of assembly, it is not a literal, but only a substantial conformity to it that is demanded. The great variety of cases as well as of official qualifications and training, forbids a demand of formal rigidity: 2 T. R. 23; 3 Burr, 1785; 1 East, 649; 11 Harris, 521; 10 Casey, 403; 4 P. F. S. 93.

2. But a greater degree of precision is required in cases where justices of the peace are invested with a jurisdiction that is new, than in those that are within their general civil jurisdiction. When such a special jurisdiction is conferred on justices of the peace, they must proceed strictly within the limits assigned by the law conferring it, and substantially according to the forms prescribed for it, and their record of the case must show that they have done so: 4 P. F. Smith, 230; 12 Id. 133. Even if it be a proceeding for the forfeiture of a hog under the stray laws, this is required: 8 Id. 496. And not less than this can be required when men are charged with crimes. It is the same as is required in the short ejectments by landlords against tenants: 5 S. & R. 174; 2 Barr, 294; 9 Id. 213; and it is the same as is required of any court invested with such special authority.

3. The laws under which this case was tried give justices of the peace authority to try cases of larceny, if the property stolen shall not exceed \$10 in value, and the complaint here is of larceny of a barrel of vinegar of the value of about \$10, and of this the defendants are convicted. As about \$10 is plainly not the same as not exceeding \$10, the record does not show that the justice had authority to try the case, and therefore this is a fatal error. It might, perhaps, have been cured, if the jury of six had found the value to be not exceeding \$10.

4. There can be no larceny except of things belonging to some person; but this record does not aver that this vinegar had any owner; it is merely described as stolen "out of car No. 1295 (L. S. R. R. car.)" This is also a fatal error.

5. The justice's jurisdiction does not appear unless his record show that the act was done in this county. Here it is not said where the larceny was committed, and therefore this is an error.

6. The jurisdiction of the jurors does not appear, because it is not stated in the proceedings that they were good and lawful men, citizens of the township, borough or city, in which the case was tried, and having the qualifications of electors therein; and this also is error.

There are some other defects in this record which we do not specify, because they were not sufficiently discussed before us, and some of them may be cured by the presumption of regularity where nothing appears to the contrary. Some things that ought to have been done do not appear, and this may be because all that was done is not fully recorded. In no case is it proper to record a case against any one without giving his or her Christian name, if it can be learned, and not merely the initial letter of it: and so the jurors ought to be named: 6 Barn. & C. 247.

In these cases justices of the peace ought to be very strict in following the law under which they act, though some things which they do may not need to be recorded. When they send up their proceedings on a *certiorari*, they ought to send up every part of them, including the complaint, warrant, *venire facias*, and all the relevant acts of the justice and parties. A justice does not properly obey the *certiorari* by sending merely a copy of the short notes entered on his docket (when he keeps short notes), but from those notes he must make up a full record of all the proceedings actually had by and before him, and certify this to the court with the complaint and writs, in return to the *certiorari*.

It is proper to remark, moreover, that it is irregular to issue a *certiorari* in such cases as this, without a special allowance by the court or by the district attorney. We may possibly hereafter find it proper to make a rule of court that such allowance may be granted by a judge at chambers.

These proceedings are to be reversed because (among other reasons) of a curable defect in the statement of the offence, and therefore we must send them to the district attorney that the statement may be amended, and then remit the cause to the justice of the peace for a new trial.

The sentence of the justice is reversed, and a new trial awarded, and the proceedings of the justice are referred to the district attorney that the complaint may be duly amended, and then remitted to the justice for further proceedings according to law.

Court of Common Pleas of Cumberland County.

[Leg. Int., Vol. 30, p. 288.]

THE CARLISLE DEPOSIT BANK vs. JACOB RHEEM.

Notice of protest having been left with A on Sunday, being told what it was, and the following Monday being in time to serve said notice: *Held*, that that was sufficient.

The court reserved the question as to whether leaving notice of protest with defendant on Sunday, 1st January, 1871, and telling him what it was, and the following Monday, 2d January, 1871, being in time to serve said notice, so that the defendant was in actual possession of it in time, and knew that he was, rendered him liable as indorser of the draft in suit.

Opinion delivered by

JUNKIN, P. J.—The defendant is sued as indorser of a draft dated November 17, 1870, drawn by William Leeds in his own favor and order, for \$1,200, at forty days, on Henry Glass, and by him accepted, payable at the Union Banking Company, Philadelphia. The plaintiff, a bank at Carlisle, over one hundred miles from the former place, discounted, in due course of business, the said draft, and at its maturity, the 30th of December, 1870, payment being refused, it was duly protested, and the notices, instead of being mailed at Philadelphia, were sent on the 31st of December, 1870, to the plaintiff, as last indorser, who undertook, that same evening (December 31, 1870), to serve the notices of protest on the

defendant, Rheem, but Mr. Smith, the teller, failing to find him, gave it over, and on Sunday, the 1st day of January, 1871, went to the house of defendant, called him to the doof, and handed him the envelope containing said notice of protest, and the jury have found that the teller, at the moment of so doing, told defendant that it contained notice of the protest of Leeds' draft. Defendant took the envelope, put it in a desk, and did not look at it until several days had passed. The question is, as plaintiff had by law, Monday, the 2d of January, 1871, to give this notice of protest, was the delivery of the envelope with its contents accompanied with the information communicated by the teller, on Sunday, sufficient to charge the defendant as indorser?

Notice of protest is authentic information from the proper source that the paper has been dishonored; its object is to enable the party notified to take measures for his own security against parties liable to him. It need not be in writing; any information coming from parties interested, and whose duty it is to give it, and certain to a reasonable intent, will suffice. When the indorser lives elsewhere than at the place fixed for payment, notice by mail may be given. It may be given verbally and personally; or in writing, and left at his place of business or dwelling. If it can be shown that it was actually received by the indorser in due time, when in writing, there is no difficulty; but when this cannot be done, then rules have been established, which, if complied with, are considered as equivalent to notice, although notice may never have reached him; actual notice dispenses with the ordinary requirements: *Hallowell & Co. vs. Curry et al.*, 5 Wright, 322. In *Bank of United States vs. Corcoran*, 3 Peters, 132, and *Dickens vs. Beal*, 10 Pet. 578, was held, though left at an *improper place*, nevertheless, if in point of fact it was received in due time by the indorser, it was sufficient in point of law to charge him, so that, after all, the question is, did he know certainly and from proper sources that the particular draft was dishonored?

Can the day on which, or the channel through which the knowledge comes, whether written or spoken, be material? Could a purchaser who had received notice of a trust on Sunday, written or spoken, say he knew it not on account of the day, and was therefore discharged? Now, it is found as a fact, that the teller told him that the envelope contained notice of the protest of the Leeds draft. He had knowledge of the fact, both verbally and in writing. That under our Sunday law, all contracts made on that day are to be considered as not made at all, is conceded. And had the 1st of January, 1871 (Sunday), been the last day the plaintiff had for giving this notice, it would have amounted to nothing, for he was not bound to open it on Sunday, and the authorities say it is to be considered as received on Monday: *Parsons on Notes and Bills*, ed. 1873, page 515, vol. 1. And he cites *Wright vs. Shawcross*, 2 B. & Ald. 501, note; *Bray vs. Hadwen*, 5 Maul. & S. 68; *Deblieux vs. Bullard*, 1 Rob. La. 66, where notice was given on the 4th of July, Marvin, J., said, it might be given on Sunday. "If a holiday or Sunday intervenes, it is not counted, but adds one more day of allowable delay. If notice is received on Saturday, it need not be forwarded until some mail on Monday, even if there is a Sunday mail."

Then plaintiff had Monday, the 2d of January, 1871, to give the notice, and inasmuch as the defendant was in possession of the envelope

containing said notice on that Monday, he was duly notified that the draft was protested. Had a post carrier delivered the envelope on Sunday, it would suffice; but then that would be on the ground that it was duly posted, and he bound, though he never received it. Nor do we rest our conclusions on the ground that he might have declined receiving the letter, and by receiving waived irregularity, because the statute was not his to waive. But we place his liability *solely* on the ground, that on Monday, the 2d of January, 1871, that day being in good time, he had in his possession a notice of the protest of the draft in suit, and *knew that he had it*.

Had the envelope fallen from the clouds, or been carried to him in the mouth of a fish, like the tribute for Cæsar, with the direct information from the teller of the bank, "this is the notice of the protest of the Leeds draft," he would have been fixed for the money, because the whole purpose of the notice is to inform him of non-payment.

The statute does not forbid talking or writing on Sunday, and a fact communicated on that day is as much the truth as it would be spoken on any other. In *Barker vs. Hopkins*, 7 Barr, 492, a bond void because executed on Sunday, was used as an *admission* of liability, and Coulter, J., there says: "A man may acknowledge the truth on Sunday, and he knew of no rule preventing its being given in evidence against him, that if a man write a letter on Sunday, and sends it to his creditor, who gets it on Monday, or even takes it from the office on Sunday, he presumes it would be competent evidence against the debtor." He further adds: "We cannot carry the law so far as to say that the admission of a previous existing debt, made on the Sabbath, is not good." And in *Uhler vs. Applegate*, 2 Casey, 140, it was held that an agreement, though made on Sunday, and void as an executory contract or agreement, yet the payment of the money afterwards, and its receipt by the obligee, constituted a new contract, which was binding on the parties. Defendant was not bound to open and read the notice on that Sunday; the law gave him until Tuesday, the 3d of January, 1871, to notify the parties to whom he would look for indemnity, but being in possession of the notice on Monday was all the law required, and how he came by it, is not material, so that he had it. We are not unmindful of *Steen's Appeal*, 14 Smith, 447, where it was held, that an order to the sheriff, given verbally on Sunday, to resume action on a suspended execution, did not create a lien on the defendant's goods nor give precedence; and that the sheriff was not bound to receive such order on Sunday, for if he was, then he must keep his office open on that day. It is enough to observe, that this order required the sheriff to *act*, and this he was not bound to do on Sunday. But had a written order been handed to him on Sunday, which was in hands on the Monday following, and he knew its purport from the person handing it, could he have said he was not bound to act? How he came by it, if he had it on Monday, would not be material.

For the reasons given, we think defendant is liable, and therefore determine the reserved point in favor of the plaintiff, and the latter is permitted to enter judgment on the verdict.

Court of Common Pleas of Dauphin County.

[Leg. Int., Vol. 30, p. 21.]

COMMONWEALTH OF PENNSYLVANIA vs. ERIE AND PITTSBURGH RAILROAD COMPANY.

A railroad company in embarrassed circumstances sold a large amount of stock below par, and afterwards paid a dividend on its whole capital. There being no proof that this was profits: *Held*, that the company was not liable to the tax on profits for this amount.

Action of debt on settlement made by auditor-general and State treasurer.

PEARSON, P. J., charged the jury as follows:

This case presents a single question. Has the Erie and Pittsburgh Railroad Company made or declared dividends during the year 1870 on which it has failed to pay taxes to the Commonwealth? If it has, the settlement made at the department was probably right. That the company has increased its capital stock during that time is very clear. Prior to the year 1870 the amount of capital stock was \$998,600.

By a resolution of the 19th of May, 1870, each holder of stock was authorized, on the payment of four dollars, to have a share of stock, valued by the company at forty dollars, for each share held by him. The actual value of this stock has not been shown; whether worth more or less than the four dollars is not in proof. We have no other evidence on which to predicate the charge than the letter of Wm. Brewster, the treasurer of the company, dated January 3, 1871. Does that show a dividend made or declared? It shows that the stock was thereby increased nearly a million of dollars, and the report of the 5th of December, 1870, states that a dividend of seven per cent. was declared on the whole stock—the new as well as old—amounting to \$34,981.75, on which the tax of \$1,746.59 was paid. This was on \$1,996,100 of stock. By the first section of an act passed March 24, 1864, this company was authorized to issue a preferred stock, not exceeding five hundred thousand dollars in amount, to be sold at such prices as could be obtained, on which should be paid a dividend of eight per cent., if so much was earned, for the purpose of purchasing rolling stock, improving the road, and paying debts, etc. By a further supplement the company was authorized to increase its capital stock 20,000 shares, computed at fifty dollars each, to issue bonds not exceeding thirty thousand dollars per mile, bearing interest at seven per cent., and sell the same at or below par: See act 3d April, 1867.

Afterwards by an act of the 28th of March, 1870, authority was given it to sell its common stock, instead of the preferred stock. Under this latter act the million of dollars in shares appear to have been sold. All of this legislation tends to show the great embarrassment of the corporation, and its struggle to keep up its road, and there is no proof in the case even tending to establish that the million of dollars was the profits of the road which should have been divided among the stockholders. This case has not the smallest resemblance to that of *The Cleveland and Ashabula Railroad*, 5 Casey, 370; *The Crane Iron Company*, 5 P.

F. Smith, 448, or *The Atlantic and Ohio Telegraph Company*, 16 P. F. Smith, 57, in each and all of which actual dividends were earned and declared. Had it been proved that this company had earned money by which the value of its stock was increased and the sale resorted to as a method of dividing it among the stockholders, we should hold it to be a stock dividend; but nothing of the kind is proved or pretended. The State cannot be deprived of her taxes by any kind of evasion or legerdemain; but her claim, like that of all other plaintiffs, must be established by evidence. It certainly is not shown by the letter of Mr. Brewster, and that is the only proof laid before us.

A dividend, both in common and legal parlance, is "a portion of the principal or profits divided among several owners of a thing:" Bouvier's L. Dictionary. Webster defines it to be "a part or share." In speaking of it in connection with moneyed corporations we always understand it to be the share or profit, coming to each holder of stock. From aught that appears in this case it was a sale of stock at a very low price in order to raise money. It is true the privilege was given to stockholders alone; but neither that, nor the dividend soon after declared on the whole stock, prove that any money was earned by the company which should have been divided. On this increase of capital the State was entitled to her bonus under the law. She also got her tax on the dividend, which very probably never was earned, but cannot claim it on the sale of the stock without more proof than was exhibited in the case. The jury will therefore render a verdict in favor of the defendant. To this charge the counsel for the Commonwealth did except, and at request of the attorney-general this exception sealed.

Hon. F. Carroll Brewster and John C. Knox, Esq., for Commonwealth.

Louis W. Hall, Esq., and Hon. Francis Jordan, for defendant.

[Leg. Int., Vol. 30, p. 265.]

JACOB WANAMAKER vs. EMMA WANAMAKER.

The respondent in proceedings for divorce lived in this county. Her residence was known to her husband, and his relatives, and probably to his counsel.

The libel was not signed with the libellant's name. The subpoena, and alias subpoena were returned nihil.

The proclamation was inserted by the direction of counsel for libellant in an out of the way place in a weekly paper, that it might not be seen.

The notice of the time and place of taking testimony before the commissioner was not served personally on the respondent as directed by the court.

Held, That the court had power to reverse a decree of divorce thus obtained from it.

Opinion delivered by

PEARSON, P. J.—On the 4th day of February, 1873, Jacob Wanamaker obtained a decree divorcing him from the bonds of matrimony entered into with his wife Emma, and on the 3d day of March following, Emma, the wife, presented her petition praying to have the decree revoked and annulled on the ground of fraud and want of notice of the application. Many depositions have been laid before the court, from which the following facts are made out by what we believe to be the decided weight of the evidence. But before going into what we conceive to be the actual merits of the case, we will point out a grave legal irregularity in the proceeding.

Applications for divorce must be regularly signed, and verified by affidavit, before a subpoena can lawfully issue. This is signed by one "Jacob Barnhardt," and the affidavit signed in like manner. Whether this was in reality done by the libellant, or not, is not made to appear. The whole proceeding was *ex parte*, the wife never notified in any way, and therefore the irregularity is not cured. The libellant must at his peril take care to have all regular, and irregularity in the affidavit in failing to follow the words of the act of assembly was held to be fatal in *Hoffman vs. Hoffman*, 6 Casey, 420. The words of the statute are probably set forth here, but it is not signed in the name of J. Wanamaker, but of Jacob Barnhardt. This we consider fatal in a case where there was no service, or appearance to cure the defect. There is no name inserted in the beginning of the affidavit, which is left blank, therefore it cannot be ascertained from the record who was meant.

Emma Wanamaker was born in this city; her parents lived here, and the evidence shows that she always resided with them, with the exception of a day or two when she was with her husband at his father's. Her residence was well known to her husband, and all of his relatives. It is more than probable that it was known to his counsel also. A subpoena in divorce issued after she had been absent about a year. That writ was returned "nihil." An alias issued with like return. After this the proclamation was published in the newspaper as required by law. Both the sheriff and his deputy inquired as to the residence of this woman. The counsel said she lived on Allison's Hill, or had lived there, without giving any further information. The deputy sheriff was led to believe that she no longer resided there. Her father's name was not imparted to the sheriff, and as "Allison's Hill" contains several hundred houses it was extremely difficult for the sheriff to discover her residence, unless informed as to her family. This was known to the libellant and all of his family; to his counsel also. The husband was in the practice of sending money to her monthly, under an order of maintenance, which was delivered by his relatives. When the proclamation came to be made, the counsel desired that it should be inserted in an out of the way place, that it should not be seen, and took charge himself of the advertisement. The editor was requested to have it put in the weekly paper in an out of the way place, giving as a reason, that he did not want it seen by the party to whom it was addressed. The weekly paper had not more than some twenty subscribers in the city, whilst the daily had doubtless several thousand. It is pretty clearly proved that Emma never saw the proclamation, or even heard of it, until after the divorce was granted. It is equally clear that pains were taken to keep the whole proceeding concealed from her. True, some of the witnesses stated that Emma said she heard her husband was going to obtain a divorce, but could not get it without her signature, or name, whilst this is denied by her, and if said, she was greatly mistaken in law, yet she could clearly say he could not obtain it without notice to her, as she resided in the county. The desertion was said to have taken place on the 1st day of February, 1871. Before the two years' absence was completed, to wit: on the 23d of January, 1873, application was made for the appointment of a commissioner to take testimony, and it was ordered by the court that notice be given to the respondent, if

resident in the county, and if not, to be placed in the prothonotary's office. It was well known to the party, his counsel, and every witness examined in the case, as is shown by their testimony since taken, that respondent lived in the city with her father, yet the notice was put in the prothonotary's office, and the testimony taken before the commissioner, *ex parte*. At the time the witnesses were examined the two years had expired, and five days over; but had it been made known to the commissioner that notice had not been given as ordered, he would doubtless have refused to take the depositions, and if made known to the court, they would have been rejected, and not suffered to be read. They were illegally taken. It is thus manifest that a gross fraud was practised on both the party and the court, one which vitiates the whole proceeding, and must not be suffered to prevail. On the 3d day of March, less than a month after the decree, an application was made to rescind it, and the fact is now interposed that the libellant is again married, and would be placed in a most unpleasant situation, as well as involving his present wife in trouble, should such a decree be made. If he married within less than a month after the decree, we can only say that it was done in hot haste, and must have been on a very short courtship, or one carried on whilst he was a married man. So far as he is concerned, it is only a just punishment for the fraud meditated and practised.

Has this court the power to reverse the decree thus obtained? Ever since the decision in *Fermor's Case*, 3 Co. Rep. 77, 78, it has been held with great uniformity of decision that any judgment or decree, however solemn, may be vacated for fraud and covin. The act, however lawful, yet if mixed with fraud in its procurement, may be vacated and annulled. It would be a mere affectation of learning to cite authorities for a principle so long settled, and universally sustained. This has been applied to decrees in divorce cases, not only by the courts of this State, and of England, but also by nearly every other State of the Union. In *Allen vs. Maclelan*, 1 Io. 328, it was held that the court had power to vacate a decree of divorce at a subsequent term for fraud practised, although the party obtaining it had married again. This is sustained, and again acted on, in *Hoffman vs. Hoffman*, 6 Casey, 417. In *Boyd's Appeal*, 2 Wright, 241, a decree was vacated for fraud even after the death of the libellant, and the respondent restored to her marital rights of property, the decree having been fraudulently obtained without notice to the wife. In *Adams vs. Adams*, the whole subject came under review in the Supreme Court of New Hampshire, where all of the authorities are collected and recited. There, one of the evidences of fraud was, that the publication was in a newspaper which there was every reason to believe neither the wife nor any of her friends could see. Where an artifice of this kind is practised, the court should not hesitate to rescind the decree, says the chief justice, in delivering the opinion. See this case well reported in the "Legal Opinion," of May 3, 1873. We are also asked to say that the sheriff's return of "nihil," not sworn to, is impotent. It would be better for the sheriff in such cases to pursue the act of assembly, by making proof that "the defendant is not to be found in the county," such return should be verified by affidavit, but the return here made has been customary, and we are

unwilling to question it now, as it might injuriously affect many cases. The sheriff's return cannot readily be impeached or treated as a nullity. As the other reasons are sufficient, and call upon the court to reverse the decree, we shall not pass on this exception. The decree of divorce must be reversed, and rescinded at the cost of Jacob Wanamaker, so far as regards this proceeding.

And now, to wit, June 24, 1873, the application in this case came on to be heard upon the petition, answer and evidence, and was fully argued by counsel, whereupon it is considered by the court, that the decree made on the 4th day of February, 1873, granting a divorce to Jacob Wanamaker from the bonds of matrimony contracted between him and his wife, Emma Wanamaker, be, and the same is hereby rescinded, revoked and annulled, as fully as if the same had never been made and ordered, and it is further decreed that the said Jacob Wanamaker pay the cost of this proceeding.

J. M. Speise and F. K. Boas, Esqs., for petitioner.

J. M. Wiestling, Esq., for wife.

Court of Common Pleas of Delaware County.

[Leg. Int., Vol. 30, p. 77.]

EXECUTORS OF WILLIAM WRIGHT, DECEASED, vs. ADMINISTRATORS OF THOMAS W. CHEYNEY, DECEASED.

Judgment entered against administrators, in a suit upon a contract of their decedent, for want of an affidavit of defence, is irregular and void, and will be stricken off on motion.

Opinion delivered *January 27, 1873*, by

BUTLER, P. J.—That a judgment cannot generally be taken against administrators and others sued in a representative character, for want of an affidavit of defence is clear; 4 Y. 235; 1 Miles, 263; and is admitted by plaintiffs' counsel.

But it is argued that the case before us forms an exception, and 1 Miles, 256, and 1 Grant, 208, are cited as authority for the position. We do not think, however, that these cases bear any resemblance, in fact or principle, to our case. In the first, the suit was upon the agreement of the executor defendant; and the second was a claim against lands in the hands of the guardian defendant, which arose during his possession. In both instances, the defendants would necessarily be cognizant of any defence which might exist; or as likely to be so, as if the suits were against them personally. They did not, therefore, fall within the reason of the rule which exempts representatives defendants from the operation of the statute. In the case before us, the suit is upon a judgment confessed by the decedent. Administrators and other representatives are, under such circumstances, nearly, if not quite as likely to be unfamiliar with the case, and the defence to which it may be liable, as if the suit were upon the bond out of which the judgment grew, or any other contract of the decedent. Many things may have occurred to relieve the defendant, since the judgment was confessed, and before it came to the charge of the administrators. He may have

paid the debt in whole or in part, or may have been released by the plaintiff, or discharged by operation of law. We do not see anything, therefore, to take such a case out of the general rule, nor do we see any satisfactory evidence, that the administrators *agreed* that judgment should be so taken.

It would seem, from Mr. Sutton's affidavit, that their counsel, as well as himself, supposed at the time, that the plaintiffs were entitled so to take it, and contemplated its being done. There was nothing in the nature of an agreement, however, about it, and the opinion of counsel rendered any agreement unnecessary. The defendants' counsel acquiesced in Mr. Sutton's view of the law, and this is all we can see in the transaction to which he testifies—nor will the delay in making the motion to strike off, avail the plaintiffs. The administrators were not required to act; the judgment entered by the prothonotary on the plaintiffs' order, was a nullity. The fault is not a mere *irregularity*; it goes deeper, and avoids the judgment absolutely. There was no authority for the prothonotary's act; it was a violation of law. The judgment is, therefore, like judgments against married women or minors entered on warrant of attorney. Indeed, it is even more objectionable, because in such cases it might well be said that the record is correct, and the judgment therefore valid; that in the absence of a plea of coverture or infancy, it must have been so rendered in an adverse suit; that the defendant should now be treated as having waived or failed to put in the proper plea, and that the court should not, therefore, interfere, unless some equity be shown requiring it. But even there, the Supreme Court holds, that the judgment is absolutely void, that the court has no discretion in the matter, and that it must be stricken off: *Knox vs. Flack*, 10 H. 537; *Glyde vs. Keister*, 1 Casey, 85; *Keiper vs. Hefrick*, 6 Wr. 335; *Brunner's Appeal*, 11 Wr. 67.

Nor would our refusal to interfere help the plaintiffs—on writ of error (for which the administrators are yet in time), the Supreme Court would reverse the judgment.

The rule to strike off must therefore be made absolute.

E. Spencer Miller, Esq., for plaintiffs.

Court of Common Pleas of Juniata County.

[Leg. Int., Vol. 30, p. 47.]

WILSON vs. MARTIN, EXECUTOR OF BELFORD, DECEASED.

Promise to pay debt of another—Indorser of note.

Summons in assumpsit. Pleas: "Payment and non assumpsit."
Charge to the jury, by

JUNKIN, P. J.—Under exceptions we have admitted all the evidence plaintiff offered, and there being no controverted facts, we must give you binding instructions. The facts are, that on the 14th May, 1867, Suloff, Frew & Parker gave their sealed note to plaintiff for \$2,650, due one day after date, and for money loaned. Eighteen months after this note matured, plaintiff, considering the makers unsafe, offered to give

them the use of the money still longer, provided they would give him security. One of them saw Belford, the defendant's testator, who agreed to go bail on the note. They saw plaintiff, who produced the note; when Belford saw it, he observed, "There is no room at foot of note for me to sign my name, but I suppose if I sign across the back, it will do as well." And he did so. Plaintiff remarked, "I suppose you consider that you are going security on this note?" and Belford replied, "O yes, of course." The second count in the declaration properly lays the giving of time to Suloff, Frew & Parker, as the consideration to support the promise, avers that plaintiff forbore for more than one year, which is a reasonable time, and brings the case within the rule laid down in *Bizler vs. Ream*, 3 Penna. Rep. 282. Yet we must instruct you that the plaintiff cannot recover.

First. Because the indorsement of Belford on this sealed note creates no liability whatever.

Secondly. Because the plaintiff, in order to establish a liability or undertaking, on the part of Belford, to pay this debt of Suloff, Frew & Parker, is compelled to resort to parol evidence, and as this is offered to show the former's undertaking to pay the debt of another, it is inadmissible for that purpose, the act of 26th April, 1855, forbidding.

Jack vs. Morrison, 12 Wr. 113; *Schafer vs. Bank*, 9 Smith, 144, show "that an indorsement is not a note in writing as required by the statute," and "that no proof of a liability for the debt of the maker, different from that which the indorsement imports, can be made by parol." The offer here is to show that when Belford wrote his name across the back of the sealed note, he agreed that it should bind him all the same as if his name had been signed below Suloff, Frew & Parker's; and this cannot be done; it would be establishing Belford's liability by parol, and not by the writing itself.

It is supposed that *Slack vs. Kirk*, 17 Smith, 380, conflicts with the cases cited. But not so; they harmonize; Kirk by mistake became first indorser, and he should have been second to Slack, but Kirk waived the statute, paid the bank, and was subrogated to its rights and recovered against Slack. It is also supposed by counsel that *Steininger against Hock's Executors*, 3 Wright, 263, bears upon this case. There it was doubtful whether Steininger, who had written his name equidistant from the ends of a promissory note, signed and sealed by Eshbach, was a witness or a maker; the fact was equivocal; he might be one or the other, according to intention, as the word witness was nowhere written on the face of the paper, and his name was not found so far to the left, as to preclude his having signed as a maker. If it was intended to be his note, there was the promise in writing, and no question could arise under the statute.

Therefore, under the evidence, we instruct you to find for the defendant.

E. D. Parker, Esq., for plaintiff.

E. S. Doty & Son, Esqs., for defendant.

Court of Common Pleas of Luzerne County.

[Leg. Int., Vol. 30, p. 21.]

WASHBURN *et al.* vs. BALDWIN.

1. A rule to show cause must not be predicated upon a mere abstraction, nor upon any colorable pretext invented for the purpose of *pumping* the court, but upon something actual and pertinent; which, when determined judicially, shall control the subject-matter involved.
2. A case stated, whether the action has been instituted by amicable agreement or by process issued, must contain a full and certain statement of all the facts belonging to the case; so that when a judgment is entered thereon, it shall be capable of enforcement to the same extent as though reached by the verdict of a jury.
3. A rule to show cause, and a case stated, must be *real*, never *supposititious*.
4. Any attempt to obtain the opinion of the court upon a question of law, through the instrumentality of a mere supposititious case, is reprehensible, and the parties offending may be punished for a contempt of court.
5. A defendant is entitled to the benefit of the exemption law in a proceeding commenced by attachment under the act of 17th March, 1869, if the original demand be founded on contract.

Opinion delivered January 6, 1873, by

HARDING, P. J.—This is a rule to show cause why the claim of the defendant to exemption shall not be allowed, *nunc pro tunc*, as against the attaching creditors.

In disposing of the question, our attention will in the first place be directed to the necessary characteristics or requisites of a rule to show cause, and also to the peculiar circumstances under which this rule seems to have been taken.

In many respects a rule to show cause stands upon the same ground as a case stated. The latter must be a *real*, never a *supposititious* case. Whether the action be entered by amicable agreement, or instituted by process issued, the parties may state certain facts for the opinion of the court; and if they desire the benefit of a writ of error, they may provide for it by an accompanying agreement. They may agree to all the facts belonging to the case, thus saving the expense and labor of having a jury find the same in the form of a special verdict. The law arising from the facts thus agreed upon they may refer to the court.

But the statement of the facts must be full and certain, so that a judgment may be rendered thereon which shall have the same binding validity upon the parties, and shall be capable of being enforced to the same extent and in the same manner as though it had been reached through a verdict of a jury.

And so a rule to show cause must be founded on a *real* case. More than that, it must be predicated not upon a mere abstraction, nor even upon a colorable pretext invented for the purpose of *pumping* the court, but upon something actually pertinent to the case itself; and which, when judicially determined, shall have controlling force in respect to the subject-matter involved.

How is it with the rule before us? That it is predicated upon a *real* case, and not upon an abstraction, nor upon any mere colorable dispute, would seem to be conclusive, for the term and number, and the names of the parties are given at length. Besides there has been submitted to

us a mass of papers which show that the plaintiffs and defendant have enjoyed a tilt at litigation of very considerable proportions.

We have been unable, however, anywhere in it to discover even the shadow of a feature indicating either the propriety or the pertinence of this rule. To make it absolute, therefore, would be not only a waste of words, but a clear mistake of judicial function. The adjudication could not be enforced, nor would it control in the slightest degree the subject-matter involved.

From a sort of agreement drawn up by counsel, as they say, "for the purpose of having a rule granted," we learn that Washburn & Co., the plaintiffs, proceeded by attachment under the act of 17th of March, 1869, against Baldwin, the defendant, summoning also several parties as garnishees. The attachment, though contested by the defendant, was sustained by the court, and judgment was subsequently reached as provided by the act. Judgment was also taken in due form against such of the garnishees as admitted their indebtedness to the defendant at the time of the service of the attachment, amounting to twelve hundred dollars. Whether or not execution as against the garnishees had gone out, we are not advised, though the presumption is that it had; for appended to the agreement referred to is the copy of the following notice:

"SIR:—You are hereby notified that Henry Baldwin, the defendant above named, claims the benefit of the act of assembly, approved April 9, 1849, exempting property to the value of three hundred dollars from levy and sale in the above stated case."

The notice was duly signed, and, we *suppose*, it was served properly and in due time upon the sheriff.

Now, if such was the fact, a rule like this was manifestly out of place. Conceding even that the defendant's right to exemption existed, and that it was put in jeopardy, or set at naught altogether by the officer, still a proceeding after this fashion could be of no avail. Neither "a rule to show cause," nor any other known lawful process issuable, or cognizable in the case of "Washburn & Co. against Henry Baldwin," would help the matter at all. And yet, the proper course under such circumstances, to secure all that seems to have been contemplated by the present proceeding, is so plainly set out in the statute, and so fully discussed and illustrated in a long line of judicial decision upon the subject, that any lawyer "who runs may read." The remedy was in open sight. If the officer refused to comply with the demand for exemption after notice, no matter whether the property attached consisted of goods and chattels, or "bank notes, money, stocks, judgments, or other indebtedness," trespass or case would lie against him at once; and further, in case a sale had followed such refusal, and the money had been paid, it might have been ruled into court, and distribution had according to law.

Under these views it is apparent that the present rule must be discharged. We cannot, however, suffer the occasion to pass without alluding to the improper practice of basing rules to show cause, and cases stated upon mere myths. We have already pointed out the requisites which each must have about it. Our views are by no means original in this respect; on the contrary, they are founded upon well-established precedent.

But concerning the professional impropriety of originating rules and

cases of the kind spoken of, we refer to *Lord vs. Veasle*, 8 Howard, 255, where the chief justice says: "Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law, which the party desires to know, for his own interest or his own purposes, where there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended as a punishable contempt of court."

Assuming in conclusion, however, that the rule before us was not taken originally for the purpose of obtaining the opinion of the court as to the law governing a defendant's right to exemption in a proceeding under attachment law of 1869, albeit there is a strong smell to the contrary, but that it resulted rather from a misconception of the course to be pursued; and further, being satisfied that no possible harm can befall anybody connected with the case as it stands, from an expression of opinion as to the right of a defendant to exemption under the circumstances referred to, we imitate the "easy good nature" of Chief Justice Black in *Berks County vs. Jones*, 9 H. 415, and say that a defendant is entitled to the benefit of the exemption law in a proceeding commenced by attachment, under the act of 17th of March, 1869, if the original demand be founded on contract.

C. Smith, Esq., for rule.

E. B. Sturges, Esq., contra.

[Leg. Int., Vol. 30, p. 77.]

GARRISON vs. BRYANT *et al.*

1. When several different forms of action will lie in any particular case, as *assumpsit*, *trespass*, or *trover*, each having a separate scope in respect to the measure of damages not identical with either of the others, and a plaintiff makes choice of the one under which he will proceed, it becomes the duty of the court to see that the latitude of damages appertaining in the particular form of action chosen, be neither abridged nor enlarged.
2. When property has been wrongfully taken and converted, and the owner brings *assumpsit*, though either *trespass* or *trover* would lie, also, he not only waives all right to recover damages for the tortious taking and conversion of the property, but he subjects himself to the consequences of having his demand considered as a *debt*, against which the defendant may set off any counter demand he may have against the plaintiff.
3. If *trespass* be brought in such a case, the plaintiff may recover as well the value of the property, as damages for the tortious taking and malicious conversion of it; and the measure of damages is for the jury, under the facts as developed by the evidence.
4. But, if out of the three forms of action thus open to him, the plaintiff selects *trover*, his recovery will generally be limited within the ordinary scope of that action, namely, the value of the property at the time of its conversion, with interest; though where its value has in some way been enhanced by the wrong-doer, if its identity has been preserved, the damages may be increased to correspond with such enhanced value, and interest.
5. In an action of *trover*, the *quantum* of damages, according to the rules of law, is to be ascertained by the jury; the *rule* of damages is a pure question of law, not to be submitted to the discretion of a jury.

Exceptions to report of referee. Opinion delivered January 6, 1873, by HARDING, P. J.—An exception has been taken in this case to a finding, "as matter of law," by the referee, which raises the question as to the proper rule governing the measure of damages in an action of *trover*. It has been long settled in this county, that the *quantum* of damages

according to the rules of law, in this form of action, is to be ascertained by the jury; the *rule of damages* is a question of law, not to be submitted to the discretion of a jury: *Baker vs. Wheeler*, 8 Wend. 505. In this State, although the general scope of the action as well as the power of juries over the damages, has been somewhat enlarged, compared with the English authorities on the subject, and, indeed, with those of several States of the Union—New York, Connecticut, Massachusetts, Vermont and others—to meet particular and varied circumstances of wrong-doing and outrage, still, as a general principle, the rule as stated remains intact.

The propriety of the rule is clearly manifest.

The action of trover is often brought where *assumpsit* or *trespass*, or even *replevin*, would lie. It is a form of action where damages are sought to be recovered for specific personal property which has been wrongfully appropriated, or converted by another to his own use. The true measure of damages, therefore, would seem to be the value of the property converted. But if *assumpsit* would be as well in any particular case, why not, it may be asked, seek the same end under that form of action? We answer, because a plaintiff, though he might bring either *assumpsit* or *trover*, would be bound by all the legal incidents appertaining to the particular form of action chosen. The consequences following from the action of *assumpsit* might defeat the purpose in view, namely, the recovery of full damages for the value of the specific property converted. He would not only waive any right to damages for the tortious act by which the property was converted, but he would subject himself to the consequences of considering the demand in question as a *debt*, against which the defendant could set off any counter demand which he might have against the plaintiff: *Hunter vs. Prinsep*, 10 East, 378, 391; *Farmers' Bank vs. McKee*, 2 Barr, 319; *Stevens vs. Low*, 2 Hill, 132.

And again, although *trespass* might be maintained by the plaintiff in the particular case, and damages be recovered both for the tortious taking and the malicious conversion of the property, still, as a matter of law, if out of these three forms of action the plaintiff chose to bring *trover*, his recovery of damages would necessarily be limited within the ordinary scope of that action. The amount could be neither lessened nor enhanced by a showing of the manner of *taking*, whether tortious or otherwise: *Finch vs. Blount*, 7 Car. & Payne, 478; *Bac. Abr. Trover*, A. 3. Where, however, the value of the property has in some way been enhanced by the wrong-doer, while its identity has been preserved, the damages may be increased to correspond with such enhanced value, with interest.

As a general proposition, therefore, the justness of the rule will hardly be impugned. But, as we have seen, a particular case might arise where either *assumpsit* or *trespass*, or *trover*, or even *replevin*, would lie, and as these actions are severally different in form, each having a separate scope in respect to the measure of damages not identical with either of the others, when a choice has been made by a plaintiff of the one under which he will proceed, it becomes the duty of the court to see that the latitude of damages legally appertaining to the particular form of action chosen, be neither abridged nor enlarged.

This can only be done by such binding instructions to the jury upon

the law governing the subject, as will properly control and regulate their finding. If they then go astray, or if they disregard the instructions altogether, their verdict should be set aside at once.

Now, as a referee stands in the place of a jury, it is equally the duty of the court, where the action is trover, to see that the measure of damages adopted by him is in conformity with the rule applicable in that form of action. And as a record of the whole testimony taken in the case comes up with his report, we ought to be able to determine in this respect as correctly perhaps as though the cause had been tried before the "court with a jury."

Upon a full examination of the testimony returned in the case, we are not prepared to say whether either of the four actions mentioned, *assumpsit*, *trespass*, *trover*, or *replevin*, might not have been maintained by the plaintiff; but as he selected *trover*, all of the legal incidents of the action must go with it. Clipped of nothing properly belonging to it, nor augmented by anything pertaining to any other form of action, it must stand squarely on its own bottom, the plaintiff being entitled on the one hand, and the defendant protected on the other, in the swing for damages according to the compass allowable in this form of action.

The referee has returned substantially the following findings of fact in the case, namely, that some time in the year 1869, Nelson Marshall became the purchaser, under a landlord's warrant against E. G. Garrison, the plaintiff here, of a team of horses, wagon and harness, and that by virtue of an arrangement between Marshall and Garrison, the property so purchased became and was subsequently treated as a pledge for the payment by the latter to the former of an indebtedness amounting to several hundred dollars; that in the year 1870, Jacob Bryant, one of the defendants here, by virtue of certain false and fraudulent representations, procured the delivery of the property to him; that immediately afterwards, he sold it to Cease, the other defendant here, who had been made cognizant of all the circumstances under which the possession had been obtained by Bryant; and further, that a sufficient demand had been made by Garrison, the plaintiff, for the property, prior to instituting his action.

Some of these findings are certainly warranted by the testimony. But complaint is made because the referee gave Marshall the position of pledgee of the property after the sale under the landlord's warrant. Manifestly it can be a matter of no concern whatever to the defendants in this action, whether the property was taken into the possession of Marshall or not, or whether it was retained by Garrison. As between Marshall and Garrison themselves, the arrangement was good, and capable of being enforced. Besides, neither Bryant nor Cease ought to complain. They both had full notice of the arrangement. There could have been no misleading of either of them, therefore, by any circumstance connected with the possession of the property, whether held by Marshall or by Garrison.

But how objection can be taken by defendants' counsel to this particular finding of the referee passes our comprehension. It constitutes the very ground for the partial relief they seek; it is the sheet-anchor to the only well-founded exception taken to the report. That exception is, that "the referee erred in not allowing the one hundred dollars paid by

Bryant to Marshall." It raises the legal question before adverted to, as to the rule governing the measure of damages in an action of trover. We have seen that this question, whether the cause be tried before a jury, or before a referee, is purely for the court. If tried before a jury, it would be clearly our duty to charge them upon the law applicable under the particular facts, as they might find them; if tried before a referee, it would be none the less our duty, where his report had been returned, together with the testimony, and where an exception had been taken which raised the point, to see that his findings in respect to the measure of damages were in conformity with the rule applicable in that form of action.

That the defendants are liable in damages to the plaintiff is beyond question. But the *extent* to which they are liable, constitutes the leading and only feature now to be considered. In determining this, we must necessarily be governed by the testimony. We see nothing in that indicating outrage in the taking of the property; and even had there been trespass, still being trover, under the authorities to which we have referred, this could not have been made a substantive ground for damages. The general rule for the measurement of damages in this action, though in Pennsylvania there are exceptional cases, is the value of the property at the time of the *conversion* of it, together with interest up to the date of judgment: *Kennedy vs. Whitwell*, 4 Pick. 466; *Pierce vs. Benjamin*, 14 Pick. 356; *Greenfield Bank vs. Leavitt*, 17 Pick. 1; *Watt vs. Potter*, 2 Mason, 77; *Bissell vs. Hopkins*, 4 Cowen, 53, 478; *Dillenback vs. Jerome*, 7 Cowen, 294; *Stevens vs. Low*, 2 Hill. 133; *Clark vs. Whitaker*, 19 Conn. 320.

Recurring again to the evidence, the fact is disclosed that Garrison had gradually paid off the indebtedness to Marshall, so that only about one hundred dollars remained unpaid when Bryant appeared on the stage. With the assent of both Marshall and Garrison, he paid to the former one hundred dollars in question, and thereupon took, and removed the property into his possession. The inducement for this change on the part of Garrison was a promise by Bryant of a "longer job of work," and greater facility and better terms for the redemption of the property than existed under the arrangement with Marshall.

Now, the referee has very correctly found as matter of fact, that Marshall was pledgee of the property. But if Marshall was a pledgee how can the conclusion be escaped that Bryant, who took his place, was a pledgee also? and that he acquired a lien on the property to the extent of one hundred dollars, the amount he had paid to Marshall? The ownership of it, however, continued in Garrison, the pledgor, as fully as it had been while Marshall held it.

When, therefore, Bryant sold it, and thus put its return beyond his power, conversion was complete; it was tortious and he became at once liable to the pledgor in damages. His co-defendant, Cease, was no better off, for he participated in the tort, knowing it to be such.

In an action of trover, brought by a pledgor against a pledgee who has tortiously sold the property pledged, or otherwise wrongfully put it out of his power to return it, the pledgor's right to recover is beyond a doubt; but the pledgee in such an action has a right to have the amount of his lien on the property recouped in the damages: *Bac. Abr. Bail-*

ment, B.; *Jarvis vs. Rogers*, 15 Mass. 389; *Stearns vs. Marsh*, 4 Denio, 227; Story on Bailment, 315, 349. The amount of that lien in the present case, as we have already seen, was one hundred dollars. And this the plaintiff all along recognized. He offered to pay it on the return of his property. He had made provision for the money with his friend, Paul Dunn.

But as we said before, while there is nothing in the testimony indicating outrage in the *taking* of the property, the case is otherwise with respect to the *conversion* of it. Neither the skirts of Bryant nor the skirts of Cease are clean. Vexation and oppression plainly stand out; and had the evidence been more specific concerning the injury suffered by the plaintiff, and resulting directly from the conversion, we should not have meddled with the judgment rendered by the referee, even though it had been much larger than it is. We should have adopted the theory more especially of the cases in this State, namely, that while in the action of trover a jury (or a referee) ought not to give vindictory damages, yet a palpable injury beyond the mere value of the property, may frequently become a fair subject of compensation: *Dennis vs. Barber*, 6 S. & R. 420; *Berry vs. Vantrics*, 12 S. & R. 89; *Taylor vs. Morgan*, 3 Watts, 333; *Harger vs. McMains*, 4 Watts, 418.

In conclusion, we see no reason why the judgment as found by the referee shall not stand, except for the mistake in the amount. This may be corrected without resort to another trial: *Jarvis vs. Rogers*, *supra*. It is based, and correctly too, upon the highest value of the property at the time of the conversion. An allowance of one hundred dollars, with interest from July, 1870, reaches the end in view. We accordingly direct that judgment be entered in the case for two hundred and eighty-seven dollars and fifty cents.

C. E. Rice, Esq., for plaintiff.

Foster & Lewis, for defendants.

[Leg. Int., Vol. 30, p. 321.]

COMMONWEALTH vs. DAVENGER.

1. A summary proceeding before a justice of the peace is in the nature of a criminal prosecution for a public crime or offence, and must be regulated by rules similar to those adopted by the common law in criminal prosecutions, the accused being acquitted or condemned by the decision of the person appointed by the statute for judge.
2. Where a statute creates an offence, and, on conviction, imposes a penalty, *without* prescribing a method of prosecution, the proceeding may be instituted either by summons in debt, in the name of the Commonwealth, for the uses directed in the statute, or by warrant of arrest, at the discretion of the justice. And in such a case there is no appeal. The Legislature may declare a new offence, and provide a mode of ascertaining the guilt of one charged with it, as well as the measure of punishment.
3. Where, however, an offence is created by statute, and, on conviction, a penalty is imposed, to be recovered by any person suing for the same, *as debts of like amount are by law recovered*, the proceedings should be by summons in debt, in the name of the Commonwealth for the use of the party suing, followed by judgment for the penalty, if the evidence establishes the guilt of the accused.
4. A summary proceeding must be predicated on an information containing the day and the place of the taking of it, the name of the informer, the name and official designation of the magistrate taking it, the name of the offender, together with an *exact* description of the offence, and the time also of its alleged commission—not the precise day, perhaps, but one within the limitation fixed in the particular statute for prosecution.

5. The record of a conviction or judgment must show that a strict observance of these preliminaries has been had; further, that the defendant was summoned, or had notice of the charge, and an opportunity to make his defence; that he was convicted on confession, or that evidence, such as is within the approval of the common law, was adduced in support of the charge, giving the evidence or the exact substance of it, not its effect or result, and that the witnesses were sworn or affirmed. The particular circumstances should also be set out, showing jurisdiction and a conformity with the law on the part of the justice. Conviction, judgment, and execution according to the common law, or as varied by the statute, should follow; though, unless specially so provided, the alternative duration of imprisonment on failure to pay or to furnish a sufficient distress, need not appear in the conviction. Imprisonment is a part of the warrant of execution, and must be set out therein.
6. A proceeding, however, to recover a fine for the violation of a borough or city ordinance is not a summary proceeding; it is of a civil nature, and is to be conducted according to rules applicable to civil suits. Where the penalty goes to the city or borough, the corporate name of such city or borough should be used as plaintiff; where it goes to the person suing, the corporate name of the city or borough for the use of the informer, naming him, must appear as plaintiff; but where the action is *qui tam*, a part of the penalty going to the informer, and a part to the city or borough, the informer must be named as plaintiff, suing for himself as well as for the city or borough.
7. The record of a conviction or judgment in such a case must show jurisdiction on the part of the magistrate; it must specify the ordinance violated; it must note a penalty imposed conforming precisely with the fine covered by the ordinance; it must show either that the defendant confessed the charge, or that it was made out by the proofs; that the witnesses were sworn or affirmed; that the commission of the offence was within the city or borough enacting the ordinance, and that judgment was duly entered.

Opinion delivered September 8, 1873, by

HARDING, P. J.—This case comes before us on a *certiorari*, directed to James Helm, Esq., a justice of the peace, to remove the proceedings before him of the conviction of the defendant for an alleged violation of the 7th section of an act of the general assembly, approved April 28, 1872, entitled, "An act to incorporate the Wyoming Camp Meeting Association of the Methodist Episcopal Church."

Justices of the peace are clothed with summary powers in proceedings to recover forfeitures under penal acts of assembly; and, also, with powers partaking somewhat of a summary character for the recovery of penalties or fines for violations of municipal ordinances. Their duties in such cases, and their understanding of the methods of procedure, are not always comprehended; and, hence, their records frequently become subjects of review in the higher courts.

Penalties and forfeitures under penal statutes, in the sense appropriate in this connection, are synonymous terms; and the same is true of penalties and fines arising from violations of municipal ordinances.

Where a statute creating an offence provides that the person so offending, on conviction thereof before a justice of the peace, shall pay a fine, *to be recovered as debts of like amount are by law recoverable*, by any person who may sue for the same, the proceeding should be by summons in debt, in the name of the Commonwealth, for the use of the party suing, followed by a judgment for the penalty, if the evidence establishes the guilt of the accused. Resort to conviction by summary process need not be had. It was decided, however, in *Garman vs. Gamble*, 10 W. 382, that the proceedings in such a case might be instituted in the name of the party suing; but the more correct practice would seem to be to name the Commonwealth, for the use indicated by the statute, as plaintiff:

Commonwealth vs. Wolf, 3 S. & R. 48; *Van Swartow vs. Commonwealth*, 12 H. 131; *Carlisle vs. Baker*, 1 Y. 472; *Commonwealth vs. Borden*, 11 P. F. S. 272.

But where a statute imposes a penalty, and gives authority to justices of the peace to take cognizance of its violation, *without prescribing a method or form for the prosecution*, the proceeding may be instituted either by summons in debt, in the name of the Commonwealth, for such uses as the particular statute may direct, for the penalty, or by a warrant of arrest, at the discretion of the justice. The power of arrest attends all offences which justices of the peace have authority to punish by statute: 4 Black. Com. 290; 1 Chitty's Crim. Law, 336; *Commonwealth vs. Borden*, supra.

This doctrine does not apply where the statute creating an offence provides at the same time a specific mode of prosecution. And where the alleged offender is a citizen or well-known inhabitant, the use of a summons is all that would be necessary; but where he is an irresponsible or transient person, resort may be properly had to a warrant of arrest.

The proceedings are in derogation of the common law, and operate to the exclusion of a trial by jury. And in such a case, too, there is no appeal, no matter though the amount of the penalty exceeds five dollars and thirty-three cents. The Legislature may declare a new offence and prescribe the mode of ascertaining the guilt of those who are charged with it, as well as the extent of their punishment: *Van Swartow vs. The Commonwealth*, supra.

But superior courts have rigidly confined this mode of jurisdiction on the part of justices of the peace within the strict letter of the respective statutes conferring it; and in reviewing the proceedings, they require that rules similar to those adopted by the common law in criminal prosecutions, shall appear to have been observed: 1 Burr. 613; 4 Burr. 2281.

Actions of this character must be founded on an information containing the *day* of the taking of it; the *place* where it was taken; the *name* of the informer; the *name* and *official designation* of the magistrate before whom it is taken; the *name* of the offender, together with an *exact description* of the offence; and, also, the *time* of its alleged commission—not the exact day, perhaps, but a point of time should be indicated, so that the prosecution shall appear to have been instituted within the limitation of the particular statute.

Strictly speaking, such proceedings are criminal prosecutions, being nothing less than methods of punishment for a public crime or offence. They are summary convictions. The party accused is acquitted or condemned by the decision of such person as may be appointed by the statute for judge: 4 Black. Com. 281, 282; 1 Amer. Law Jour. 246. The record of a justice of the peace in such cases, however, must show that the preliminary steps, as stated, have been observed. It must show further, that the defendant was summoned, or had notice of the charge, and an opportunity to make his defence; that the evidence taken was such as the common law approves, giving it at length, or, at least, the exact substance of it, not its effect or result; the particular circumstances must be set out so that it may appear that the justice conformed to the

law, and did not exceed his jurisdiction; the conviction, judgment, and execution, according to the common law, or as varied by the special authority under the statute, should follow. But the conviction, unless otherwise specially provided by the statute, need not state the alternative duration of imprisonment, on failure to pay or to furnish a sufficient distress. Imprisonment is a part of the warrant of execution, not of the sentence; and the warrant must set forth the alternative punishment: *Commonwealth vs. Borden*, supra.

Again, proceedings for the recovery of fines for the violation of borough or city ordinances, are not summary proceedings. On the contrary, "they are of a civil nature, and must be regulated and decided by rules applicable to civil suits, though being penal in their character, some of the principles relative to summary proceedings are applicable to them." They should not be instituted in the name of the Commonwealth, but where the whole penalty goes to the city or borough, the corporate name of such city or borough should be used as plaintiff. If, however, the whole penalty be given to any person who may sue for it, then the corporate name of the city or borough, as the case may be, to the use of the informer, naming him, should appear as plaintiff; but where the action is *qui tam*, one portion of the penalty going to the informer, and the other to the city or borough, the informer should be named as plaintiff, suing for himself as well as for the city or borough. Further, it is vitally essential in these cases, that the record of a conviction or judgment against a defendant, should exhibit jurisdiction of the subject-matter on the part of the magistrate, a specification of the ordinance violated, and the imposition of a penalty conforming exactly to the fine covered by the ordinance. It must also show either that the defendant confessed the charge, or that evidence was adduced to support it; that witnesses were sworn or affirmed; that the commission of the offence was within the city or borough enacting the ordinance; and that judgment was duly entered: *The City vs. Duncan*, 4 Phila. Rep. 145.

In the case before us, the proceedings were instituted by summons. The section of the act of assembly under which they were moved, is in the following terms: "It shall not be lawful for any person or persons to erect, place, or have any booth, stall, tent, carriage, or any other place whatsoever, for the purpose or use of selling, giving, or otherwise disposing of any articles of traffic, such as pastries, meats, watermelons, fruits, *et cetera*, within two miles of the place of holding the camp-meeting of the said association, without first obtaining a license, under the same rules and regulations as now provided by law, from the judges of Luzerne county for that purpose, and for which they shall pay a license-fee of fifty dollars to the treasurer of said county, for the use of the Commonwealth of Pennsylvania; nothing in this act shall be taken, construed, or understood so as to affect any person or persons who shall have a permit in writing from the managers of said association to sell bread and other necessary articles of food for man and beast," etc.

The tenth section provides, that any person or persons violating the provisions of section seven, "shall, on conviction thereof, forfeit and pay a fine of twenty-five dollars and costs; and if said fine and costs are not paid on conviction, then every such offender shall be committed

to the jail of Luzerne county, there to remain for thirty days, or until the fine and costs are paid; the justices of the peace of Luzerne county shall severally have jurisdiction of all causes of action arising under this act."

The first exception to the record here cannot be sustained. Judgment was entered in conformity with the statute, and agreeably to well-established practice. The second exception, however, is well taken. It strikes at the manner of setting out or charging the offence. We have already shown that the information must contain an *exact* description of the offence. The information here *more* than fails to meet this requirement. Indeed, it sets out no offence at all. And the record follows, convicting the defendant of the offence "*charged upon by the said information.*" The fact that the "defendant did erect and have a booth, stall or place for selling and disposing of watermelons, ice-cream, cider, pastries, fruits, *et cetera*," and that he sold these articles "during the time of holding religious worship within the distance of two miles of the place of holding the camp-meeting, did not, *per se*, constitute an offence." Under the statute, however, if he thus carried on a traffic *without* obtaining from the court a "license," or *without* a permit from the managers of the association, *then* he was an offender; and if the proofs were full upon the point, his conviction would have been altogether regular. But the information should have stated, not alone that he sold ice-cream and the like, but that he did it without first obtaining the *license* or the *permit* mentioned in the statute; and the proofs should have made out the charge. Neither was done. On the contrary, the defendant was in effect charged with, and proved to have been *feeding the hungry* only; and for this, for aught contained in the information, or shown by the proofs, he may have had both a "license" and a "permit."

The exception raising the question of the constitutionality of the act we pass, remarking, by the way, that there is nothing in the Constitution to forbid the Legislature from creating a new offence, and prescribing such mode as they please of ascertaining the guilt of those who are charged with it: *Van Swartow vs. The Commonwealth*, supra.

The proceedings are reversed.

C. S. Stark, Esq., for plaintiffs.

C. E. Rice, Esq., for defendant.

[Leg. Int., Vol. 30, p. 337.]

MASTERS vs. TURNER.

1. Jurisdiction by attachment in execution must be exercised by aldermen and justices of the peace within the scope of the authority conferred upon them by statute; otherwise their proceedings are illegal and void.
2. When judgment has been recovered against a defendant, and execution thereon returned, "no goods," debts due to him, deposits of money made by him, stocks, or other personal property, not exempt by law, belonging to him, may be attached, and the person in whose hands such property is, may be summoned as a garnishee; and after a service of interrogatories and a rule upon him to answer, as the law directs, if he be in default, or if it appear by his answers, or be shown by the proofs on hearing, that he owes the defendant a debt, or has property belonging to him *equal to*, or *less* in amount or value than the plaintiff's judgment, then judgment should be specially entered that the plaintiff have execution of such amount or sum, naming it, thus in the hands of the garnishee; and that, if the garnishee

refuse or neglect, on demand made by the constable, to pay the same, then it should be levied of the garnishee's goods and chattels, as in case of a judgment against him for his own proper debt; and further, that he be thereupon discharged as against the defendant of the sum so attached and levied.

3. If, however, the debt thus due by the garnishee or the value of the property thus attached, be *greater* than the plaintiff's judgment, then the special judgment should be that the plaintiff have execution of so much thereof, naming the amount, as will satisfy his judgment against the defendant, *with interest and costs*; to be followed as in the former instance, by the additional entry relative to a refusal to pay, and also relative to a discharge on the part of the garnishee.
4. Where the garnishee is in default, or contests his indebtedness to the defendant, or where there is a recovery against him for an amount greater than that admitted by his answers to be due to, or belonging to the defendant, the plaintiff is entitled to have execution against him for the costs of the attachment proceeding; but it is otherwise where he admits his indebtedness, or admits that he has property of the defendant, and surrenders it.
5. The execution against the garnishee should recite the form of the judgment, and contain a command to the constable in substantial conformity with it. A further command should be inserted, that in the event of a levy and sale of the goods and chattels of the garnishee, if the proceeds exceed the amount for which the execution issued, the overplus, *less the costs of sale*, should be returned to the garnishee.
6. A plaintiff has no right to receive from a constable anything more than the sum to be collected under the command of the writ, even though his judgment against the original defendant be greater than that against the garnishee.
7. A judgment entered against a defendant and a garnishee jointly is without warrant in law; and though neither appeal nor *certiorari* be taken, and six years afterwards it be revived against the garnishee alone, neither appeal nor *certiorari* being then taken, and execution be issued on the latter judgment, commanding the constable to levy the same of the goods and chattels of the garnishee, *certiorari*, if taken in time, will avail to set aside the execution. Age, no matter how great, can never infuse vitality into a judgment entered by an alderman or justice of the peace, which lacks statutory authority originally.

Certiorari to William H. Trescott, Esq. Opinion delivered *October 9, 1872*, by

HARDING, P. J.—On the 24th of January, 1866, the plaintiff here recovered a judgment before B. Sutliff, Esq., one of the justices of the peace of Luzerne county, against John Wolf. On the 17th of March following, an execution issued, and a return of "no goods" was had. On the 19th of the same month, an attachment in execution issued against G. G. Turner, garnishee. Interrogatories were filed, and copies, accompanied with a rule to answer, were served both upon the defendant and garnishee. Trial and judgment followed. The docket entry is as follows:—"After hearing proofs and allegations, judgment in favor of plaintiff and against John Wolf and G. G. Turner, garnishee, for fifty-one dollars and ninety-eight cents."

Thus stood the record for a period of about six years, or until the 6th of March, 1872. A *scire facias* was then moved before William H. Trescott, Esq., requiring "G. G. Turner, garnishee of John Wolf, to appear and show cause why execution should not issue on a judgment obtained before B. Sutliff, Esq., late justice of the peace of Huntington township." Service was had upon the defendant, and judgment followed thus:—"Now, to wit, March 16, 1872, demand judgment on B. Sutliff's docket for \$51.98—interest from April 14, 1866, to March 16, 1872, \$18.44. Therefore judgment in favor of plaintiff for \$70.42 and costs."

On the 19th of April, 1872, an execution issued upon this judgment, reciting the fact that Peter Masters had before that time recovered a

judgment against *G. G. Turner*, "before William H. Trescott, Esq., one of the justices of the peace in and for said county, for the sum of \$70.42, as also for the sum of \$2.45 costs," and containing a command to the constable to levy the same "of the goods and chattels of the said *G. G. Turner*, and make sale thereof according to law." Four days afterwards *certiorari* was taken to this execution, thus bringing the matter before us on review.

The exceptions taken to the record strike as well at the regularity of the proceedings before B. Sutliff, Esq., as at those subsequently instituted before William H. Trescott, Esq. But it is urged on the part of the plaintiff, that the original proceeding in attachment execution was in conformity with law; that judgment was regularly entered therein against the garnishee; that neither appeal nor *certiorari* was taken within the time prescribed by the act of 20th March, 1810, either as respects the judgment of April 14, 1866, or the revived judgment of March 16, 1872; and that, therefore, *certiorari* cannot now avail to reverse the judgments, or either of them, nor to set aside the present execution.

In disposing of the case, it will not be necessary for us to discuss at length the extent of the authority of Courts of Common Pleas to review, reverse, or set aside the proceedings of justices of the peace, brought up on *certiorari*. A long line of judicial decisions has already settled that matter beyond question. But was the present writ moved outside of the provisions of the act of 20th March, 1810? The proviso to the twenty-second section of that act, Purd. 608, pl. 28, implies the right to a *certiorari*, if the same be applied for, and served within twenty days after the issuing of an execution. Here the execution went out on the 19th of April, 1872, and the *certiorari* was obtained four days thereafter. It was in time, therefore, even under the act of 1810. The only question in the case then is, was there such a judgment as warranted the issuing of an execution in the form shown by the record? If there was not, it should be set aside.

Justices of the peace derive their authority in civil proceedings wholly from statutes. It follows, therefore, that if they overstep the powers conferred upon them, their acts are simply void: 1 Pet. C. C. R. 37; *McCale vs. Kulp*, 8 Phila. 636. Jurisdiction by attachment in the nature of an execution, was given to aldermen and justices of the peace by the act of April 15, 1846, P. L. 459, Purd. 855. The second and third sections of that act provide a means by which "stocks, debts and deposits of money belonging, or due" to a defendant may be attached and levied in satisfaction of a judgment recovered against him; and the fourth and fifth sections direct how judgment shall be entered against the garnishee. But the manner in which *execution* shall be had of a judgment thus obtained against a garnishee is regulated by the provisions of the act of June 16, 1836, Purd. 640, pl. 86: it is, "in the manner allowed in the case of effects in the hands of a garnishee in foreign attachment." This again is regulated by still *another* act of assembly, that of June 13, 1836, Purd. 720, pl. 21, 22.

How is this jurisdiction to be exercised? After judgment has been obtained against a defendant, and a return of "no goods" had upon an execution issued thereon, debts due to him, deposits of money made by

him, stocks, or other personal property belonging to him and not exempt by law from levy and sale, may be attached. His debtor, depositary, bailee, pawnee, or other person having such effects of the defendant in his hands, may be summoned as a garnishee; and after interrogatories have been filed, and a rule had upon him to answer, and a copy, both of the interrogatories and the rule, has been served as the law directs, if the garnishee shall be in default, or if it shall appear by his answers, or be shown by the proofs on hearing, that he owes the defendant a debt, or has in his hands property belonging to the defendant equal to, or less in amount or value than the plaintiff's judgment, then judgment should be specially entered that the plaintiff have execution for such sum, naming it, in the hands of the garnishee; and that, if the garnishee refuse or neglect, on demand made by the constable, to pay the same, then it should be levied of the garnishee's goods and chattels, as in case of a judgment against him for his own proper debt; and further, that he be thereupon discharged as against the defendant of the sum so attached and levied. If, however, the debt due by the garnishee to the defendant, or the value of the property thus attached be *greater* than the plaintiff's judgment, in that case the special judgment of the justice should be, that the plaintiff have execution of so much thereof, naming the amount, as will satisfy the plaintiff's judgment against the defendant, *with interest and costs*. The further entry should follow, as in the former instance, relating to a refusal to pay on the part of the garnishee, and also that relating to a discharge, as against the defendant, for the sum so attached and levied.

With respect to the costs of the attachment proceeding, the plaintiff is not entitled to have execution therefor against the garnishee, except when there has been a recovery against the latter for a sum greater than that admitted by his answers to be due from him to the defendant, or when he has been in default, or contests his indebtedness to the defendant. In either of these events, the costs of the proceeding may be imposed on him, no matter whether the debt due from him to the defendant, or the value of the property belonging to the defendant and in the hands of the garnishee, be greater or less than the amount of the plaintiff's judgment against the defendant.

Where the garnishee, by his answers, admits his indebtedness to the defendant, or that he has property in his hands belonging to the latter, and surrenders it, no liability for the costs of the attachment proceeding ensues as against him: act of June 16, 1836, *Purd.*, supra; act of June 13, 1836, *Purd.*, supra; *Layman vs. Beam*, 6 Wh. 181; *Lorenz's Administrators vs. King*, 2 Wr. 93; *Hampton vs. Matthews*, 2 H. 106; *Walker vs. Wallace*, 2 Dall. 113; *Wood vs. Ludwig*, 5 S. & R. 446; *Hall vs. Knapp*, 1 Barr, 213; *Herring vs. Johnson*, 5 Phila. 443.

Again, the execution against the garnishee should formally recite the judgment, and contain a command to the constable in substantial conformity therewith. The further command should also be inserted that, in the event of a levy and sale of the goods and chattels of the garnishee agreeably to law, if the proceeds thereof should exceed the amount for which the execution issued, the overplus, less the costs of sale, should be returned to the garnishee. A plaintiff has no right to demand or receive from a constable anything more than the sum to be collected

under the command of the writ, even though his judgment against the original defendant be greater than that against the garnishee.

Applying these principles to the case before us, how does it stand? Why, as we have seen, the original judgment recovered against the garnishee before B. Sutliff, Esq., besides being informal, was not such a judgment as the justice had authority to enter. Apart from naming G. G. Turner, the defendant here, as garnishee, it was a judgment against him and John Wolf, *de bonis propriis*. Clearly, therefore, if an execution had been issued upon it, *certiorari* would have availed to set the writ aside. And the revival of the judgment, six years afterwards, before William H. Trescott, Esq., was no better. In the *scire facias* G. G. Turner is named as the garnishee of John Wolf, but judgment, apparently by default, was entered against him generally. No mention is made in it that he was anybody's garnishee. And the execution follows against G. G. Turner personally and alone, commanding the constable to levy and sell his goods and chattels "according to law." That execution we hereby set aside; and, in conclusion, we remark, that mere lapse of time, no matter to what extent, can ever infuse vitality into a judgment entered by an alderman or justice of the peace, which lacks statutory authority originally.

George B. Kulp, Esq., for plaintiff.

Wright & Hand, for defendant.

[Leg. Int., Vol. 30, p. 353.]

KREILICH *et al.* vs. KLEIN.

1. The rule of law that, where parties to an executory contract appoint an arbiter to decide disputes which may arise under it, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, does not apply to a contract which forms the basis of a mechanic's lien.
2. The ordinary covenant in such an agreement that the costs of any changes or additions to the building, or any other matter affecting the contract, shall be submitted to an architect, whose decision shall be final and binding on the parties, will not operate to exclude the mechanic or material-man from filing his lien under the mechanics' lien law.

Rule to show cause why mechanic's lien shall not be stricken from the record. Opinion delivered *October 27, 1873*, by

HARDING, P. J.—The plaintiffs, Kreilich & Sheil, on the 16th of February, 1870, entered into a contract with H. E. Klein, the defendant, stipulating to furnish all materials and labor necessary to construct for him a building, on the west side of Lackawanna avenue, in the city of Scranton, now known as the "Opera House."

The building was to be commenced at once, and put up in a good and workmanlike manner, "in accordance with plans furnished by J. C. Sidney, an architect," and to be "furnished during the progress of the work, showing the mode of execution;" it was to be "completed in full on or before the first day of August, 1870." The price for the materials and labor was fixed at \$27,300, payable in instalments, as the work progressed; the whole, however, to be paid "in seven months after the completion of the work."

During the year 1870 and the early part of the year 1871 the "Opera House" became an accomplished fact. On the 26th of April, 1871,

the plaintiffs filed a mechanic's lien against it, nominally for the sum of \$10,000, but, as shown by the bill of particulars, really for the sum of \$2,664.23. Subsequently, a *scire facias* was issued on this lien; whereupon the defendant before pleading to the action moved the court to strike the lien from the record. The grounds upon which this motion was predicated were, substantially, that the lien was imperfect, uncertain, and not in conformity with the act of June 16, 1836, relating to mechanics' liens; and further, that the parties, by the positive terms of their contract, had appointed an umpire to determine and decide, not only upon the costs of any "changes, alterations or additions" to the building, but "in all cases affecting the contract," whose decision was to be final and binding upon them; and that, therefore, they were mutually bound by their covenant, neither the material-man on the one hand, nor the owner on the other, having a right to seek redress elsewhere.

We accordingly granted a rule to show cause why this motion should not prevail; and subsequently the counsel on both sides were heard at length in connection with it. While we see no serious difficulty about the lien so far as formality, or a compliance with the provisions of the act of June 16, 1836, and its enlargement of April 16, 1845, are concerned, there is still a question of grave importance mixed up in the controversy, growing out of the covenant for arbitrament contained in the contract.

It is a settled principle of law, that parties to a contract may stipulate that disputes arising under it, whether actual or prospective, shall be submitted to the arbitrament of a particular individual or tribunal; and though the findings of that tribunal be unsatisfactory to either or all of the parties interested, nevertheless, they will be bound by their contract, and cannot seek redress elsewhere. And the same is true of submissions of disputes not arising under written contracts. Indeed, an agreement between parties, erecting a tribunal and submitting to it differences that exist between them, is binding upon them, and equally so, whether it be in writing or not: *McManus vs. McCulloch*, 6 W. 357; *Bowen vs. Cooper*, 7 W. 311; *Leebrick vs. Lyter*, 3 W. & S. 365.

The covenant in the case before us is in these words: "It is agreed and understood that said Klein has the privilege of making any changes, alterations or additions he may desire, during the progress of the work, without invalidating this contract; the costs thereof to be determined by the architect, whose decision *in all cases affecting this contract*, shall be final and binding upon both parties." Now, it is claimed on the part of the defendant that the plaintiffs cannot escape from the covenant thus entered into, and by which they bound themselves to leave the decision of the very matters covered by their attempted lien to the final determination of the architect. It is further claimed that the defendant, having never prevented nor attempted to prevent the chosen umpire from acting as such in the premises; nay, more, that the plaintiffs having never sought an ascertainment of the amount due to them in the manner provided by the contract, they cannot come into a court of law at all for redress, either by proceedings under the mechanics' lien law, or upon the contract itself; and, finally, that the only resort the plaintiffs have against the defendant for a breach of the agreement, either as respects the costs of the whole building or the costs of the

"alterations or additions," is the appointed tribunal, and when a decision is reached from that quarter, that an action would lie against the defendant on the finding, if he refused payment of the amount.

In the case of *Monongahela Navigation Company vs. Fenlon*, 4 W. & S. 205, it was held that when parties to an executory contract make a provision in it, that any dispute which shall arise between them on the subject of the contract shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, but they must resort to the tribunal appointed by themselves, from whose award there is no appeal. This was a canal case, not a house-building case; but the principle involved seems to be the same in the one that it is in the other. Besides, the covenant in that case—"It is mutually agreed between the parties to these presents, that in any dispute which may arise between the contractor and the company, the decision of the engineer shall be obligatory and conclusive, without further recourse or appeal"—is very like the covenant here. The words, "final and binding upon both parties," are co-equal in force and meaning with the words, "shall be obligatory and conclusive." In neither case would the appended words, "without further recourse or appeal," add perspicuity or strength.

To the same general effect are the cases of *McGheehen vs. Duffield*, 5 Barr, 497; *Faunce vs. Burke & Gonder*, 4 H. 480; *Snodgrass vs. Gavit*, 4 C. 221; *Lauman vs. Young*, 7 C. 306; *McCahan vs. Reamey*, 9 C. 535; *Irwin vs. Shultz*, 10 Wr. 74; *Herdic vs. Bilger*, 11 Wr. 60; *Memphis Railroad Company vs. Wilcox*, 12 Wr. 161; *O'Reilly vs. Kerns*, 2 P. F. S. 214; and *Reading Industrial Manufacturing Co. vs. Graeff*, 14 P. F. S. 395.

In *Reynolds vs. Caldwell*, 1 P. F. S. 298, the doctrine was carried to extreme length. That was a railroad case, and the covenant between the parties was as follows: "And it is mutually agreed and understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy at law or otherwise, by virtue of said contract, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

With reference to the latter part of this covenant, we remark, that it only intensifies the former part of it, without adding legal strength or significance whatsoever. What is the meaning of the words, "shall be final and conclusive" in any dispute which may arise between the parties to this agreement relative to or touching the same? Is it any less than that recourse on the one side and the other, for breaches of the agreement, *must* be sought at the hands of the appointed umpire, and not elsewhere? If such be the appropriate meaning, then the covenant in the railroad case is also very like the covenant in the present house-building case; and, therefore, agreeing to submit all disputes which may arise under a house-building contract, to an architect, naming him, would seem to be, on general principles, as binding upon the parties to the agreement, as agreeing to submit possible disputes arising under contracts for the building of canals and railroads, measuring land, timber, and the like.

We are aware that the words, "final and conclusive," contained in

agreements for the submission of cases under the arbitration acts, have not been thus strictly construed, and that something like an express waiver of all further resort for redress, must be appended in order to end the litigation: *Mussina vs. Hertzog*, 5 Binn. 387; *Large vs. Passmore*, 5 S. & R. 51; *Andrews vs. Lee*, 3 Penn. 99; *Rogers vs. Playford*, 2 J. 183; *Bingham's Trustees vs. Guthrie*, 7 H. 419; *Wightman vs. Pettis*, 5 C. 283; but the construction is otherwise in the class of cases now specially in view.

The points ruled in *Reynolds vs. Caldwell* are substantially these: First, that the covenants having been broken, and the umpire having made an estimate or award, which was erroneous, the contractor, nevertheless, could not maintain an action at law on the agreement, but must resort to the tribunal appointed therein. Second, that the clause of arbitrator was binding, although recourse to the tribunal selected was not reasonably possible, because of circumstances which the contractor could not control. Third, that if the engineer refused to act as umpire, no action by the contractor could be maintained on the agreement; or, if acting, he fraudulently injured the contractor, the remedy was by suit against the guilty party, namely, the umpire, and not on the contract. Fourth, that though the award of the umpire was palpably erroneous, yet revision of it could only be reached before the umpire himself; and if this was not possible, then the defendants were not responsible on their covenants.

We repeat, this was carrying the doctrine to extreme length, even to the very verge. It must be observed, however, that a distinction is made between agreements which provide for a *general reference*, and those which designate a *particular individual or tribunal*; the former, being executory, may be waived or revoked; the latter cannot.

But there is a feature connected with contracts which form the basis of mechanics' liens, that, in our judgment, must remove them beyond the operation of the rule under consideration. The mechanic and the material-man stand upon different ground from that occupied by the contracting parties in any of the cases to which the rule in all its stringency has been applied. The latter had but a common law right, namely, that of suing on their contracts; they never had anything more; and waiving this by appointing a tribunal of their own, they were rightfully held to their covenants. Now, the mechanic and the material-man have this common law right also; but they have more. The act of June 16, 1836, commonly known as the mechanics' lien law, enlarged by the act of April 16, 1845, gives to them a *statutory* right in addition to that inhering by the common law. Indeed, long prior to these enactments, this particular class of citizens had repeatedly attracted legislative attention. A remedy was given to them at last, which, as compared with that common to all other business men in the Commonwealth, is nothing less than extraordinary. Experience has shown, however, that it has not been attended with improper results.

Mechanics and material-men contract with owners for the erection of almost every species of building; and, generally, if the proposed structure be one of importance, a covenant is inserted that it shall be built in accordance with plans which have been furnished by an architect. And as all such structures commonly develop, as the work goes on, the necessity of change or alteration, a further covenant is usually inserted,

that the costs of any departure from the original plan shall be submitted to the architect, whose decision shall be final and binding upon the parties. The covenant often goes far enough to cover a submission of the cost of the whole building to the architect. But submitting the cost to a chosen umpire is one thing; yielding a remedy specially given by statute to secure its payment, is quite another. We make no war on the maxim—*Interest reipublicæ ut sit finis litium*—we simply hold that the contract is to be construed according to the sense in which it was mutually understood and relied upon at the time it was entered into. This is the great object of the law; it is the leading principle of the rules to be observed in the construction of contracts.

What was the understanding of the parties to this agreement in respect to the matter of a lien? "it is mutually agreed and understood that the said Krelich and Sheil are to furnish a release of liens whenever so required." They had no judgments, no mortgages; they were to have none. What other lien then could have been contemplated except a mechanic's lien?

A question may arise, however, whether these contractors have not estopped themselves by their covenant from establishing the value of their work and materials, other than by the testimony of the architect; but, as this can only come up at a subsequent stage of the proceeding, we are not called upon to decide it now.

In conclusion we remark, that engrafting the stringent rule of law, rightly applicable in the cases to which we have referred, upon contracts which found mechanics' liens, even though they do contain the ordinary covenant of submission to an architect, would work the overthrow, possibly, of half the mechanics' liens in the Commonwealth.

The rule is discharged.

John Handley, Esq., for plaintiffs.

P. R. Weitzel, Esq., F. W. Gunster, Esq., and Hon. W. W. Ketcham, for the defendant.

[Leg. Int., Vol. 30, p. 406.]

COMMONWEALTH *ex rel.* BROWN *vs.* WILLIAMSON *et al.*, SCHOOL DIRECTORS, ETC.

1. The provision in the school law authorizing the directors of adjoining districts to establish joint schools, applies where the number of pupils in each is not large enough to warrant the expense of establishing and maintaining separate schools; but, by uniting the two, a number is reached which meets the contemplation of the statute.
2. While school directors are necessarily clothed with large discretion in the management of the public schools, which will not be repressed on the part of the courts by anything less than a generous and liberal supervision, still it is a mistake to assume that this discretion is unlimited. Judicial authority may be invoked as successfully to restrain the illegal acts of school directors, as it may be to restrain official wrong-doing from any other quarter, or by any other class of men; it may be invoked likewise to compel school directors to discharge their duties under the law.
3. School directors have neither authority nor discretion to send pupils between the ages of six and twenty-one years, be they white or black, out of their proper district for instruction, except when by reason "of great distance from, or difficulty of access to, the proper school-house" of the district, such pupils can be more "conveniently accommodated in the schools of an adjoining district."
4. Where the number of colored pupils in any district is less than twenty, there is no provision in the law which excludes them from the schools where white children are taught; and if the directors refuse to admit them thereto, *mandamus* will avail to correct the wrong.

Opinion delivered *November 10, 1873*, by

HARDING, P. J.—On the 29th of September, 1873, the relator filed his petition in this court, setting forth: First, that J. C. Williamson, Daniel Shovelin, M. B. Baldwin, Patrick Donahoe, and John McGavin, were the school directors of the First school district of the city of Wilkesbarre: Second, that he is a colored man, and a resident, and taxpayer in the said district: Third, that he has made application to the said directors for the admission of his two children, Letta and Walter, each above the age of six and under the age of twenty-one years, to the public or common school of said district, and been denied: Fourth, that no separate school for the tuition of colored children has been established in the said district; and that there are not twenty colored children therein between the ages of six and twenty-one years: Fifth, that the proper school-house of the said district is near to his residence and easy of access, and that the only reason his children have been refused admission thereto, is because of their color. His petition concludes with a prayer that a *mandamus* may be issued out of this court, commanding the said directors to admit his said children into the proper school of the said district.

In response to this prayer, we awarded an alternative *mandamus*, returnable at the Argument Court, October 9 following. To this writ the respondents made answer: First, that this court has not jurisdiction, because the respondents are by law invested with discretionary power in the management of the public schools in said district: Second, that they have provided a proper and lawful public school where the children of the relator may be educated; and that, in so doing, they have exercised a wise discretion, with which this court has no right to interfere: Third, that the number of colored children in said district, including the children of the relator, is twelve, not enough to justify the establishment of a separate school: Fourth, that the respondents have, in connection with the directors of the Third school district of the city, the same being an adjoining district, established a joint school having suitable rooms, competent teachers, and all necessary apparatus for instruction, where the colored children of the two districts, those of the relator included, attend, and have attended for years; and that the proper proportionate expense thereof, as the same has become due, has been borne and paid by the respondents.

To this return the relator demurred, assigning causes as follows: First, that the respondents have no discretion under the law which permits them to exclude children between the ages of six and twenty-one years, from the proper school-house of the district in which they reside, nor to compel such children, against the wishes of their parents, and their own, to attend the schools of an adjoining district: Second, that the respondents have neither power nor discretion under the law, to make a distinction between white and colored children, nor to send the latter into the schools of an adjoining district because their number is too small to warrant the establishment of a separate school.

The proceeding raises some important questions which we are asked to pass upon, regardless of any informalities connected with the issue and pleadings. Under the school law of our State, the directors or controllers are necessarily clothed with large discretion in the manage-

ment and control of the public schools. If this discretion is to be limited by the exercise of anything less than a generous and liberal supervision on the part of the courts; or, if the official acts of school directors are to undergo a suspicious, jealous, and constant scrutiny on the part of the public, the school system itself will be shorn of much that renders it so useful and beneficent. Good men will shrink from assuming official responsibilities under the system; the door to mismanagement and disorder will be opened; inefficiency and decay will be imminent.

It is a mistake, however, to assume that this discretion is unlimited. Judicial authority may be invoked as successfully to restrain the illegal acts of school directors, as it may be to restrain official wrong-doing from any other quarter, or by any other class of men. It may be invoked likewise to compel school directors to discharge their duties under the law.

In the case before us, we fail to discover that any great constitutional question is involved, or that any right of the relator, or his children, growing out of the fourteenth amendment of the Constitution of the United States, or under the civil rights bill, has been challenged, invaded, or denied. The question here is, whether these colored children of the relator have the right to be admitted into the public schools of the First school district of the city of Wilkesbarre, or whether they shall be compelled, against the wishes of their parents and their own, to resort to a separate school established for colored children in an adjoining district? It is not denied by the respondents that no such separate school has been established in the First school district of the city of Wilkesbarre, nor that the relator is a citizen and tax-payer in the district, nor that his children have been refused admission to the proper public school therein. But the respondents claim that they are invested with an exclusive discretion in this business; and that having provided a school in an adjoining district where these and other colored children of the First district may be educated, the relator, willing or unwilling, must send his children there.

The twentieth section of the act of May 8, 1854, P. L. 621, Purdon, 243, pl. 46, provides, *inter alia*, in relation to the province of school directors, that "they shall have power with the directors and controllers of the adjoining districts, to establish joint schools, and the expenses shall be paid as may be agreed upon by the directors or controllers of said adjoining districts."

Our attention has been called to a most compact and convenient volume, entitled, "The Common School Laws of Pennsylvania and Decisions of the Superintendent, revised and arranged by Charles R. Coburn, Superintendent Common Schools." We quote the language there used in connection with this particular feature of the statute: "The number, location, size and arrangement of school-houses, and the necessity of establishing and discontinuing them, have been decided by the courts of several counties to be questions for the discretion of the proper board of directors, without control by judicial authority, so long as a reasonable provision is made for the wants of the districts in these respects. Still, though a board which neglects to provide a sufficient number of comfortable school-houses, at proper points, within reasonable distance of all the pupils, presided over by as good teachers as can be readily procured,

and furnished with suitable furniture and apparatus, may not be liable to direct judicial control, it certainly neglects a plain duty, and betrays a sacred trust of the community. . . . The establishment of a joint school must be a matter of agreement between the boards of the two districts. Neither party can be compelled to enter into it. Such schools are usually a subject of contention, and should not be established unless the necessity for them is very pressing."

Notwithstanding this view of the case, we are impressed that this is a wise statutory provision, and, under proper circumstances, that it enables school directors to afford facilities for instruction which otherwise could not be attained. It is equally clear that their discretion should be unhampered in respect to their action under it. There are, for example, many adjoining townships in the State, each constituting a single school district, and containing a population often scattered, but sometimes gathered near the dividing lines between such townships or districts. In neither is the number of pupils sufficiently large to warrant the expense of establishing and maintaining separate schools; but, *joining* the two, a number is reached which authorizes the "joint school" contemplated by the statute.

But the case before us does not involve any of these features. Further on in the same section of the statute, P. L. 622, *Purd.* 244, pl. 53, and looking manifestly to another state of facts, this provision occurs: "If it shall be found that, on account of great distance from, or difficulty of access to, the proper school-house in any district, some of the pupils thereof could be more conveniently accommodated in the schools of an adjoining district, it shall be the duty of the directors or controllers of such adjoining districts to make an arrangement by which such pupils may be instructed in the most convenient school of the adjoining district; and the expense of such instruction shall be paid as may be agreed upon by the directors or controllers of such adjoining districts, by resolution or agreement entered upon the minutes of the respective board."

There is no ambiguity about this provision. Whenever great distance from, or difficulty of access to, the proper school-house in any particular district, has to be encountered by the pupils living therein, it is made the positive duty, as well of the directors or controllers of any adjoining district, to make an arrangement by which such pupils may be instructed in the most convenient school of such adjoining district. In *Freeman et al. vs. The School Directors of Franklin Township*, 1 *Wr.* 385, *Lowrie, C. J.*, says: "Whether the distance or difficulty of access is to be regarded as great or not, depends much upon circumstances, such as the age of the children, the density of the population, and the customs of the locality, and, therefore, must be left, in a great degree, to the discretion of the directors; and, of course, their abuse of this discretion must be very clear before they can be adjudged guilty of official misconduct." But that was a case where the school directors of adjoining districts, for reasons which the court regarded as altogether sufficient, refused to make the arrangement enjoined by the statute. The present case has no analogy with it whatever. Here the school directors, without assigning any reason other than exclusive discretion inherent in themselves, assume the right to deny the children of the relator, who is a taxpayer and

citizen of their district, admission to the proper public school therein. There is no allegation, nor pretence even, that there is "great distance from, or difficulty of access to, the proper school-house" of their district. On the contrary, it is conceded in the argument that the reverse is true. Now, while we would interpose no obstacle to the success and harmony of the public schools in the First school district of the city of Wilkesbarre, yet we must say, that, under the law, the respondents have neither discretion nor authority to send pupils, be they white or black, out of their proper district for instruction, except under circumstances as contemplated by the statute, to which we have already referred.

Again, the 24th section of the same act, P. L. 623, Purdon, 244, pl. 54, contains this provision: "The directors or controllers of the several districts of the State are hereby authorized and required to establish, within their respective districts, separate schools for the tuition of negro and mulatto children, whenever such schools can be so located as to accommodate twenty or more pupils; and whenever such separate schools shall be established, and kept open four months in any year, the directors or controllers shall not be compelled to admit such pupils into any other schools of the district."

This language is very plain. If there are twenty or more colored pupils in any school district, it is the duty of the directors of such district to establish a separate school for their tuition. When they have done this, and kept it open four months in a year, they "*shall not be compelled to admit such pupils into any other schools of the district.*" When, however, the number of such pupils in a district is less than twenty, there is no provision in the law which excludes them from the schools where white children are instructed. The doors to the proper public school in the district *where they live* must be opened to them.

Peremptory mandamus awarded, with costs.

Hon. *L. D. Shoemaker* and *G. B. Kulp, Esq.*, for relator.

Stanley Woodward and *H. W. Palmer, Esqs.*, for respondents.

Court of Common Pleas of Lancaster County.

[Leg. Int., Vol. 31, p. 79.]

A. D. HUMMER vs. THE EPHRATA SCHOOL DISTRICT.

Where upon appeal the recognizance is defective, as by reason of the want of a second surety, the appeal will not be stricken off, but the appellant will be permitted to perfect his recognizance.

Rule granted to show cause why the appeal should not be stricken off.

Rule to show cause why plaintiff should not be permitted to perfect his recognizance by adding another surety. Opinion delivered *January 17, 1874*, by

LIVINGSTON, P. J.—The report of the township auditors in the case before us, appears to have been left with the town clerk of Ephrata township, on August 4, 1873. On August 22, 1873, A. D. Hummer, treasurer of Ephrata township school board, entered his appeal therefrom, in the prothonotary's office, at Lancaster, and at the same time entered into and filed a recognizance with one surety, in the sum of one thousand dollars, being more than double the amount in controversy, conditioned to prosecute his appeal with effect, and to pay the costs and

such sum of money as he shall appear, by the verdict of the jury, to be indebted to said school district, etc.; and so far as the responsibility of the parties bound to perform the condition of the recognizance is concerned, there seems to be no question. But the recognizance is deficient in this, that it contains the name of but one surety, whereas the act of assembly under which the appeal is taken requires two sufficient sureties. The only real cause of complaint being a defective recognizance, the question presented is, shall the appeal be stricken off, or shall leave be granted to perfect it? Reasoning by analogy, we are of opinion the latter course should be pursued.

In cases of defective recognizances, given on appeals from justices of the peace, aldermen and arbitrators, the Supreme Court, commencing with *Means vs. Trout*, 1817, and continuing up to the present time, say, "That if the recognizance given on appeal from the award of arbitrators or a justice of the peace be defective, the party should be called on by a rule to perfect his bail within a given period, or in default thereof, to have his appeal dismissed," the court ought not to quash the appeal in the first instance.

In *Means vs. Trout*, 16 S. & R. 349, Gibson, C. J., says: "The recognizance is undoubtedly bad, but the question is, whether the appellee has pursued the proper course?" Great hardship has, I fear, been suffered in consequence of the strictness with which these matters have been considered in this court. When bail has been defectively given within the period prescribed, there can be neither injustice nor hardship, in suffering the appellant to perfect, as soon as the defect is discovered; such a practice would be in analogy to bail at common law. On the other hand, if a defect in the recognizance were irreparable, the appeal would be lost, and a great constitutional right frustrated; such a mischief would be intolerable, etc. The proper course, therefore, will be to call upon the appellant by a rule, to perfect his bail within a specified time, or, in default thereof, to have his appeal quashed: *Ibid*, *Noble*, for use of *Wray vs. Houk*, page 421.

In *The Burgess, etc., of Huntingdon vs. Jackson & Clark*, 2 Penna. R. 431, decided in 1831, Rogers, J., says: "The proper course for the appellee, as was decided in *Means vs. Trout*, was to call the appellant to perfect his bail in a specified period, or, in default, to have his appeal quashed."

In *Bream vs. Spangler*, 1 W. & S. 378, defective recognizance on appeal, decided in 1841, the court say: "This is a case of clear mistake by the justice, as well as the appellant, and the latter ought to have been suffered to perfect his bail, on the principle of *Means vs. Trout*. It does not appear that the appellee was too late with his motion to quash, an adjourned court being part of the term. But it is clear it ought not to have been granted." The order to quash was reversed, and the appeal reinstated. The same principle is also fully recognized in *Weidner vs. Matthews*, 1 Jones, 336, decided in 1849, and in *Carr vs. McGovern*, 16 P. F. Smith, 457, decided in 1870.

We therefore discharge the rule to show cause why the appeal should not be stricken off, and make absolute the rule to show cause why the appellant should not be permitted to perfect his recognizance, by adding another surety, and we do order and direct that the recognizance be so perfected within fifteen days from this date.

S. H. Reynolds, Esq., for plaintiff. *N. Ellmaker, Esq.*, for defendant.

Court of Common Pleas of Mercer County.

[Leg. Int., Vol. 30, p. 194.]

COMMONWEALTH OF PENNSYLVANIA, PLAINTIFF IN ERROR, vs. PETER SAAL, DEFENDANT IN ERROR.

The act of May 24, 1871, by which a person in Mercer county may be tried and convicted before a justice of the peace and a jury of *six* persons for selling liquor without a license, is unconstitutional.

It is contrary to the bill of rights, which declares "that trial by jury shall be as heretofore, and the right thereof remain inviolate."

Certiorari. Opinion delivered April 11, 1873, by

TRUNKEY, J.—Information was made before D. A. Thalimer, justice of the peace, charging that Peter Saal had sold liquor without a license, in violation of the act of May 24, 1871. By the 6th section of the act, jurisdiction is given to a justice of the peace and jury of six persons concurrent with the Court of Quarter Sessions. The defendant, without his consent, was tried before such justice and jury and convicted, and was sentenced by the justice. He complains that he has been deprived of the constitutional guarantee, "that trial by jury shall be as heretofore, and the right thereof remain inviolate."

It is scarcely necessary to remark, that a trial by jury means a jury of twelve men, who must unanimously concur in the guilt of the accused before a legal conviction can be had. No less number can satisfy the requirements in the bill of rights.

The right of trial by jury, as it existed when the constitution was adopted, has been preserved—not extended. The first constitution, adopted in 1776, secured the right in similar phrase, and with like effect as in that of 1790, amended in 1838. Then, neither usage nor right required every litigated question of fact to be submitted to a jury. We will not speak of the various civil proceedings, affecting rights of property in courts of equity and other courts. Summary convictions for petty offences have been had for centuries in England, and in Pennsylvania since her settlement. By virtue of the undefined police power, vagrants, a very comprehensive term, were always liable to summary conviction. In this State, a man may be charged as a pickpocket, or professional thief, and arrested in church or other public place, and tried before a police magistrate, who may commit him to prison not exceeding ninety days. As honest a man, or as great a rogue, as ever entered church or theatre, may be seized and summarily convicted and sentenced to imprisonment at labor for three months: *Byers et al. vs. Commonwealth*, 6 Wr. 89. The Legislature may create new offences and prescribe what mode it pleases of ascertaining the guilt of those charged with them. The act of April 14, 1851, forbidding the sale of certain liquors on the Sabbath day in Allegheny county, under a penalty to be imposed by summary conviction, is constitutional: *Van Swartow vs. Commonwealth*, 12 Har. 131. Authorities need not be multiplied. Those cited show that the Legislature has the undoubted power to create new crimes, prescribe new penalties with new modes of conviction, and to extend the application of many old laws, under the police power, for summary pro-

ceedings. The right of trial by jury, as a safeguard of the citizen, is sacred as to all offences thus tried when the constitution was adopted; but, for others, it seems a shadow, not substance.

In *Van Swartow vs. Commonwealth*, supra, Judge Black says: "The purpose of the constitution undoubtedly was to preserve the jury trial where the common law gave it, and in all other cases to let the Legislature and the people do as their wisdom and experience might dictate." I do not think he intended to apply the right strictly to where it was given by the common law, but would include cases where the right had been previously enjoyed. In the same opinion, he remarks: "Every class of cases triable by jury in 1790 are still triable in no other way, at least this statute has not diminished the number. . . . Summary convictions were well known before the formation of the constitution, and they are not expressly or impliedly prohibited by that instrument, except in so far as they are not to be substituted for a jury where the latter mode of trial had been previously established." In *Byers et al. vs. Commonwealth*, supra, it is said, that none of the constitutions contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the State or adoption of the constitution. These cases, and all others bearing on the question, which I have seen, recognize the right in any class of cases where it existed when the constitution was adopted. The point was not made in the cases cited as to a statutory offence to which the right then existed, but the care in the *dicta* give them much force, especially when they accord with the letter and spirit of the bill of rights.

In the Court of Appeals of New York, in a case arising under "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, it was held that the proceeding in a Court of Special Sessions, authorized by the said act for the trial of an offender, was unconstitutional and void, on the ground that the accused was thereby deprived of the right of trial by jury. Justice A. S. Johnson says: "We find that from 1830, at least, misdemeanors by violations of the excise laws were not triable in Courts of Special Sessions at all, but in Courts of General Sessions, or of Oyer and Terminer, which were courts proceeding according to the course of the common law. . . . It does not at all affect this argument to say at an earlier period jury trial was not a right in such cases. The course of the law is to enlarge private right, not to restrict it. When jury trial was given for the first time in such cases, it was bestowed because the Legislature desired to extend its protecting influences, and when afterwards the new constitution was adopted, jury trials in cases where it was then accustomed received the sanction and protection of organic law. Writings are to be construed as of the time when they are made, and 'heretofore,' in this clause, means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to the cases which at that earlier period were triable by jury. The act provides that offences prosecuted personally against the offender, and for which he is punishable by fine, by forfeiture, and sometimes by imprisonment, shall be tried by any one of the numerous inferior magistrates, either without a jury at all, or a jury of six men. . . . This is not what the constitution meant by jury trial. That must be, within the terms of

the constitution, a jury of twelve men. The whole provision, which was made only with a view to this kind of trial (before inferior magistrates), and not for the purpose of holding the offender to answer elsewhere, must fall : " *The People vs. Toynbee*, 2 Parker's C. C. 490.

This decision of a neighboring State, upon a question analogous to the one now pending, is entitled to great weight. The Constitution of New York was adopted in 1846, and the court held that its guarantee of a jury trial included statutory offences thus triable at that time, though they had not been at a former period, and were offences unknown to the common law. How stood the law prior to the adoption of the Constitution of Pennsylvania? Was it a misdemeanor to sell liquor without a license, and if so, how triable? Modifications of the law, or in the severity of the penalty, in nowise can affect the question.

Selling spirituous, vinous or malt liquors, without license, was not a common law offence. Under the old English statutes, keeping an ale-house without license was not indictable, for they provided that the prescribed penalty should be inflicted upon conviction before justices of the peace. These statutes were not in force in Pennsylvania, nor were they imitated in the mode of trial.

The act of 1710, 1 Sm. L. 73, prohibited keeping a dram-shop without license under the penalty of five pounds. By a supplement, passed August 26, 1721, 1 Sm. L. 127, no person, without license, could sell, or barter with, or deliver any rum, wine, etc., to be used or drank on or near the premises, or retail or sell any spirits by less quantity than one quart, nor any wine by less quantity than one gallon, nor any beer, ale or cider, by less quantity than two gallons, under like penalty as prescribed by the act of 1710. By the act of 19th of March, 1783, if any person sold any rum, wine, brandy, or other spirits, in less quantity than one quart, he should forfeit and pay for every offence the penalty of ten pounds. Two of these acts were in force long before 1776, and the other before 1790. Under them the penalty was enforced by indictment. Upon the question of the sufficiency of an indictment, in 1818, Justice Duncan said : " This form of indictment having prevailed for eighty years, been adopted by successive attorney-generals, the provisions of the several acts being nearly, if not altogether, in the same words, the court will not say that all the prosecutions during that long period of time are erroneous ; for it is admitted that this has been the only form. . . . The only remedy is by indictment : " *Commonwealth vs. Baird*, 4 S. & R. 141. The colonial legislature prescribed the offence of selling intoxicating beverages without license, and the offender was punishable only by indictment and conviction by a jury. So stood the law before, and at the time, the constitution was adopted. All persons charged with selling intoxicating beverages were tried by jury. This was their right in 1776, in 1790, and in 1838. If since taken away from that class of cases, to that extent the right does not remain as it did before. I speak of the specific offence of selling liquor without license. Other offences may be created, as selling on Sunday, to men when intoxicated, and the like, in which there would be no right of trial by jury. Under the colonial law, at one time, persons guilty of selling to minors were liable to a penalty inflicted upon summary

conviction before justices of the peace. Of course, in such a case, the right does not exist, and the Legislature could now cause the offence to be tried in the same way.

In all the supplements and changes in the law since the year 1710 I have heard of none which attempted to deprive the accused of a jury trial, except the act of May 24, 1871, and never was the penalty under any former act so severe. By this local act, the minimum for the first offence is a fine of \$100, and for the second a fine of \$200 and imprisonment for ninety days; the maximum is in the discretion of the court, or a justice of the peace. Below the grade of murder of the first degree, it is difficult to find any other crime, named in our statutes, where the maximum of fine or imprisonment is not fixed by law. Mercer county is favored with a singular exception. So highly penal a misdemeanor is no petty offence. As we have seen, it is not one created since the adoption of the constitution; and it is one of a kind then tried by jury. The only question here is, as to the validity of that part of the act which compels the accused, against his will, to be tried by a justice of the peace and jury of six persons. For this misdemeanor, under former acts, the penalty was moderate and certain, or confined within certain limits. The act before us authorizes fine and imprisonment without stint. The former secured to those charged as offenders a trial in a court of record according to the course of the common law—this provides that the accused may be tried before a court not of record without the safeguard of a jury trial. It is not the business of a court to judge of the wisdom or policy of a law; nor of the propriety of a provision whereby a prosecutor may choose the justice of the peace, and the neighborhood, charge a person with violating a highly penal statute, and compel him to submit to a summary investigation. But it is necessary to consider what the law was, and what the new act is, that we may judge of its validity. No act of assembly can be pronounced invalid by any court, unless it clearly, plainly and palpably violates the constitution. I cannot hesitate, nor doubt, in concluding that so much of the 6th section of the act as compels a defendant to be tried before a justice of the peace, violates the guarantee, "that trial by jury shall be as heretofore, and the right thereof remain inviolate."

To avoid any misapprehension, I will add that this decision does not interfere with the right of a defendant to plead guilty before the justice, or demand a trial by the justice and a jury of six persons. When he does so, the justice will proceed in like manner as in other criminal cases wherein jurisdiction has been given to justices for final disposition at the request of the defendant. But when the defendant refuses to plead, and refuses a trial before the justice, then the justice will hear the case, and, if cause appear, hold him to answer at the next term of the Court of Quarter Sessions, as in other criminal cases. For the offence charged against Peter Saal, the justice may yet give him a hearing, and thereupon, discharge, hold to bail, or, in default of bail, commit him for trial at the next term of the court.

Court of Common Pleas of Schuylkill County.

[Leg. Int., Vol. 30, p. 185.]

ASBURY F. MORTIMER vs. BARTHOLOMEW O'REAGAN.

By virtue of the provisions of the act of assembly of 20th February, 1867, the alienee of the landlord may institute proceedings under the landlord and tenant's act of December 14, 1863, to recover possession of the demised premises made by the landlord (the original lessor). To do this, attornment in this State is not necessary. By the sale of the demised premises to the grantee, and assignment of the lease to him, the law infers the consent of the tenant, and the land with the lease, and all the rights of the landlord, pass to the grantee by operation of law, and the grantee is within the provisions of the act of 6th of March, 1872, as to all the rights and privileges of the original lessor under the lease. *Tilford vs. Fleming*, 14 P. F. S. 300, followed.

Certiorari. Opinion delivered April 7, 1873, by

WALKER, J.—This was a proceeding before a justice of the peace under the act of the 14th of December, 1863 (P. L. 1125, Purdon's Dig., vol. 2, p. 883, pl. 20, and the supplement of 1867 and 1872), to obtain possession of certain demised premises.

The complaint sets forth that the plaintiff is the owner of a store and dwelling-house, with the appurtenances, and a lot of ground, situate in Port Carbon, in Schuylkill county, and that he derived the title from Henry C. Gibson, by deed dated November 1, 1869; that on February 15, 1869, the said Henry C. Gibson, being in possession, demised the premises in dispute to Bartholomew O'Reagan, the defendant, at the annual rent of \$250 for one year and one and one-half months, and from year to year thereafter; that the lease has terminated, and that he, the plaintiff, is desirous to have and repossess the premises demised, and gave on December 29, 1871, three months' notice to the defendant to deliver up possession of the premises, which the defendant has refused to do.

The proceedings were instituted on May 20, 1872, and the justice, after hearing the parties, finds the complaint just and true in all particulars, and enters judgment against the defendant that he deliver the premises to the plaintiff, and gives judgment for \$100 damages.

The defendant has, therefore, removed these proceedings into this court by *certiorari*.

At one time it was supposed that the act of 1863 applied only to landlords who had demised premises to tenants, and that the alienee of such landlord, though owner of the premises, could not proceed to dispossess the tenant under the provisions of that act, for to render the grant of a rent effectual the common law required the consent of the tenant, and *this consent was called attornment*: 4 Kent, 490.

On February 20, 1867 (Purdon's Dig., vol. 2, p. 883, pl. 21), a supplement to the act of 1863, relative to landlords and tenants, was passed by the Legislature, construing the act to apply to cases in which the owner or owners of the demised premises had acquired title thereto by descent or purchase from the original lessor or lessors. This supplement was intended to place the grantee of lands in the same position as the grantor was at the time of the sale in respect to the lease and the tenant.

The construction the Supreme Court have put upon the act of 1863,

in *Tilford vs. Fleming*, 14 P. F. S. 300, rendered the passage of the act of 1867, in this respect, unnecessary, for they held "That the statute of 4 Anne, c. 16, sec. 9, making all grants and conveyances of the remainder and reversion good and effectual, without *attornment of the tenant*, was in force in Pennsylvania:" Roberts' Dig. 45. (See the Report of the Judges of the Supreme Court to the Legislature in 1808, as to what English statutes are in force in this State: 3 Binney, 625.)

Judge Agnew, in *Tilford vs. Fleming*, says: "To prevent difficulty, however, the act of February 20, 1867, authorizes the owner of the premises who has acquired title by descent or purchase from the original lessor, to proceed under the act of December 14, 1863, and the act of April 11, 1866, and its supplements."

But the act of March 6, 1872 (P. L. 22, Purdon's Digest, vol. 2, p. 883), declares that it shall be unlawful to commence or prosecute any proceedings to obtain possession of any lands or tenements under the provisions of the act of December 14, 1863, entitled "An act relative to landlords and tenants, unless such proceedings shall be founded upon a written lease or contract in writing, or by a parol agreement, in and by which the relation of landlord and tenant is established between the parties, and a certain rent reserved."

The complaint and transcript of the justice, as exhibited, show that this cause is embraced within the provisions of the acts of 1863 and 1867, and the judgment of the justice must be affirmed, unless the act of March 6, 1872, exempts it from the operation of the above-mentioned act of assembly.

The question here is, was there a written or parol lease of the premises establishing the relationship of landlord and tenant between the parties, with rent reserved?

We must look to the proceedings to ascertain these facts.

There is some difficulty in determining whether there was a letting by Mortimer from the words of the complaint, which are: "And the said Asbury F. Mortimer then agreed that the said Bartholomew O'Reagan might continue to occupy the said premises from year to year at the annual rent of ninety dollars;" for it is argued that there is no averment that this was accepted by O'Reagan, and therefore it could not be a leasing, so as to establish the relation of landlord and tenant. The language does not satisfactorily show a leasing of the premises in the sense required by the statute, for if O'Reagan claimed by another title, connected with his lessor's title (8 P. F. S. 137), he would not acknowledge the ownership of Mortimer, and the requirements of the act would not apply.

But this difficulty is obviated by the first part of the complaint, which clearly and distinctly sets forth that the premises were demised by Henry C. Gibson to Bartholomew O'Reagan, at a rent reserved, and for a stated period, thus establishing the relationship of landlord and tenant between Gibson and O'Reagan. So it is immaterial whether O'Reagan accepted the new lease from Mortimer, for the old lease of Gibson fixes his tenancy and binds him. The tenant cannot dispute the title upon which he entered: *Holt vs. Martin*, 1 P. F. S. 499; *Bedford vs. Kelly*, 11 P. F. S. 491. Thus attornment follows assignment of the landlord by *operation of law*, and the consent of the tenant is unnecessary. The

law infers consent, per Allison, P. J., *Fleming vs. Tilford*, 7 Philada. 301. Under the act of 1867, and the decision of the Supreme Court, in *Tilford vs. Fleming*, the relationship of landlord passes to the alienee of lands without attornment, and the status of Mortimer is that of Gibson, and, as the remedies are purely civil, this act should be liberally interpreted: *Snyder vs. Carfrey*, 4 P. F. S. 90.

The record in this case shows Gibson's possession of the premises, a demise by him to O'Reagan for a certain term, with rent reserved, and notice given of plaintiff's desire to repossess the premises. These are the essentials to sustain the judgment: *McGinnis vs. Vernon*, 17 P. F. S. 149; *Givens vs. Miller*, 12 P. F. S. 183.

There is no doubt that Gibson (had he instituted these proceedings before he sold), as landlord, with rent reserved, could recover against O'Reagan, his tenant, under the facts presented. And as Mortimer (under the act of 1867) stands in the same relation to the defendant as Gibson did to the defendant, he is, we think, clearly within the provisions of the act of 1872, requiring a lease, with rent reserved, and must also recover.

Exceptions dismissed and judgment affirmed.

[Leg. Int., Vol. 30, p. 273.]

MINERS' TRUST COMPANY BANK vs. JAMES WREN, JOHN T. NOBLE AND MATTHEW RHODA.

W., N. & R. formed a copartnership for the single purpose of erecting a furnace for the Emaus Iron Company. They borrowed for partnership purposes \$15,000 from the Miners' Trust Company Bank, for which they gave their joint judgment obligation, and also deposited with the bank stock of the Emaus Iron Company as collateral security. The partnership was dissolved before the work was completed, and a short time thereafter W. was declared a bankrupt. His assignee in bankruptcy sold his real estate, at which time notice was given of the above judgment. On petition presented by the purchaser for a rule to show cause why the real estate bound by the lien of said judgment, including that of N. and R., should not be sold in the proportion or in the succession, that the owners were liable to contribute to the payment of said judgment, otherwise on the payment of the judgment, that the Miners' Trust Company Bank might be compelled to assign the judgment and the collaterals for such uses as the court might direct.

Held: 1. That as between the original parties, until there was a final settlement of the partnership business, the court would not subrogate W. to the rights of the plaintiff in the judgment notwithstanding the agreement of N. and R. to pay the partnership debts, it being alleged that the partnership transactions were unsettled, that W. was a debtor to N. and R. in a large amount, and that the consideration for the promise of N. and R. to pay said partnership debts had failed. 2. That the purchase of the real estate, having been made with notice of the judgment, was made subject to its payment by the purchaser, and that he had no claim to subrogation or contribution.

Rule to show cause. Opinion delivered by

PERSHING, P. J.—The material facts in this case are as follows: James Wren, John T. Noble, and Matthew Rhoda, in July, 1870, made an agreement by which they became partners, under the firm-style of James Wren & Co., for the erection of a furnace for the Emaus Iron Company, and for no other purpose. Of this firm Mr. Wren was the treasurer. The interest of Wren in this contract was the one-half, whilst Noble and Rhoda jointly held the other half. Before the work was completed, viz., on the 16th of October, 1871, this partnership was dis-

solved. By the stipulations of the agreement Noble and Rhoda were to pay all the debts due by the firm of James Wren & Co. It was also agreed that the agreement dissolving the partnership should be "a final and complete settlement of the affairs of the partnership of James Wren & Co., and of all claims and demands of each partner upon the others, arising out of the said partnership." The settlement being made, as expressed in the agreement, "with the understanding that all moneys and stock received by said James Wren, as treasurer of the firm of James Wren & Co., have been applied by him for the benefit of said firm, and any mistake or error in that particular was to be corrected, notwithstanding the settlement." This was followed on the 18th of October, 1871, by the receipt of Noble and Rhoda to James Wren for the books, papers, cash book, receipts, etc., of the firm of James Wren & Co., which, the receipt states, were compared and found to be correct.

On the 25th of October, 1871, James Wren was adjudged a bankrupt.

During the time the firm of James Wren & Co. was in existence, viz., on July 7, 1871, James Wren, John T. Noble and Matthew Rhoda, gave their judgment obligation to the Miners' Trust Company Bank of Pottsville for the sum of \$15,000, which money was borrowed from the bank for the purposes of the partnership. Upon this, judgment was entered July 10, 1871, in the Common Pleas of Schuylkill county, to No. 206, September term, 1871, the obligation having one year to run from its date. At the time this money was borrowed there were deposited with the Trust Company Bank, as collateral security for the payment of the loan, 302 shares of the stock of the Emaus Iron Company, of the par value of \$50 per share, all of which stock was issued in the name of James Wren & Co., and taken by them on account of their contract for the erection of the furnace for that company. James Wren testifies that this judgment was one of the partnership debts which Noble and Rhoda agreed to pay, and that upon its payment by them they were to receive the stock left as collateral security. Lewis C. Dougherty, assignee in bankruptcy, on the 23d of March, 1873, sold three lots of ground, situate in Pottsville, as the property of James Wren, to John W. Roseberry, Esq., for the sum of ten thousand dollars (\$10,000), which sale was confirmed by the United States District Court. On September 3, 1872, Mr. Roseberry presented his petition to the court, setting forth his purchase of said three lots of ground "in trust for others;" that at the time of the sale by the assignee, the judgment of the Miners' Trust Company Bank was a lien on said real estate, and still was at the date of the petition a lien on said real estate, as also a lien on the real estate of John T. Noble and Matthew Rhoda; that he was informed and believed that Wren, Noble and Rhoda had given or assigned to said Trust Company Bank 151 shares of the Emaus Iron Company, of the par value of \$15,100, as collateral security for the judgment held by said bank; that in law and equity the real estate and collaterals of the said John T. Noble and Matthew Rhoda should contribute their proper proportions towards the discharge of said judgment, and praying for a rule on said Miners' Trust Company Bank, to show cause "why they should not levy upon and make sale of the said real estate and collaterals liable to execution for the payment of said judg-

ment, in the proportion in which the properties of the said James Wren, John T. Noble and Matthew Rhoda shall in law or equity be liable to contribute towards the discharge of the said judgment, otherwise upon the payment of such judgment to assign the same together with such collaterals for such uses as the court may direct."

This application is based on the 9th section of the act 22d April, 1856, *Purd. Dig.* 827, pl. 40. This section provides, that "whenever the real estate of several persons shall be subject to the lien of any judgment to which they should by law or equity contribute, or to which one should have subrogation against another or others, it shall be lawful for any one having right to have contribution or subrogation, in case of payment, upon suggestion by affidavit and proof of the facts necessary to establish such right, to obtain a rule on the plaintiff, to show cause why he should not levy upon and make sale of the real estate liable for the payment of said judgment, in the proportion or in the succession in which the properties of the several owners, in law or equity, be liable to contribute towards the discharge of the common incumbrance, otherwise upon the payment of such judgment, to assign the same for such uses as the court may direct; and the court shall have power to direct to what uses the said judgment shall be assigned," etc.

In deciding this application, we can assign Mr. Roseberry no better position than that occupied by James Wren at the date of the sale. It must be remembered that the judgment held by the Miners' Trust Company Bank was given by the members of a firm, for money borrowed for and used in the partnership business, as is shown by the evidence. Each partner is liable to pay the whole of the partnership debts, to the last acre and the last shilling, says Lord Eldon. As between partners there can be neither contribution nor subrogation. *Baily vs. Brownfield*, 8 H. 41, is a case in point. It is there held that where partners borrow money to be used in the business which they are jointly carrying on, it becomes a partnership fund, and no matter how they stand on the security given to the lender, they are accountable to one another as partners. The relation of principal and surety has no place between them. It is not the law that a partner, after paying a partnership debt, may be substituted to the rights of a creditor against his co-partner. If as between the joint debtors themselves, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditors' security to obtain reimbursement.

The reason why subrogation is not allowed to one partner as against his copartners, or to one merely a joint debtor as against his co-debtor, is because that as between them there is no obligation resting upon one superior to that which rests upon the other: *McCormick's Administrator vs. Irwin*, 11 Casey, 111.

By the terms of the agreement dissolving the partnership, Noble and Rhoda agreed to pay the partnership debts of James Wren & Co., and thus took upon themselves the superior obligation, the effect of which was to fix themselves as principals and Wren as the surety, if the transactions between them stopped at this point. It is well settled that a binding agreement by which one copartner or co-contractor assumes the debt or agrees to bear the whole burden of its payment in discharge of

the rest, will give rise to the relation of principal and surety, and with it to the right of subrogation to the remedies of the creditor on the one hand, and to that of discharge on the other, if those remedies are wrongfully impaired or surrendered: 1 L. E. C. Equity, 153. But the right of subrogation or of contribution is subject to principles of law which are presented by the testimony taken on this rule. Where the original debt springs from a partnership transaction, there can be no substitution before a settlement of the partnership accounts, clearly evincing that the partner whose estate has been taken in satisfaction for the partnership debts, in defeat of his individual creditors, was not indebted to his fellow, and that no countervailing equities existed in the latter. And the duty of showing this devolves on the party claiming to be substituted, in the clearest manner: *Sterling vs. Brightbill*, 5 W. 229; *Gearhart vs. Jordan*, 1 Jones, 325. If the surety be also a debtor, he has no claim to be substituted. It has been repeatedly held that care must be taken to make no order of substitution or subrogation where injustice would be done the plaintiff or other parties whose interests are involved. In the case now before us, James Wren testifies that he complied with the conditions stated in the agreement for the dissolution of the firm of James Wren & Co., and that there has been a final settlement of the partnership business. In flat contradiction of this, John T. Noble testifies that Mr. Wren has not complied with the conditions on which the dissolution was to be a settlement of their partnership transactions; that he is indebted on these transactions to Noble and Rhoda to the amount of nine thousand dollars (\$9,000), and in effect, that the consideration upon which Noble and Rhoda agreed to pay the firm-debts of James Wren & Co. has failed. Here is a conflict in the evidence which cannot be decided one way or the other in this proceeding. But until it was settled, if James Wren himself were making this application, that the joint business in which he and Noble and Rhoda were engaged has been settled, and that he (Wren) was not indebted as alleged in the deposition of Noble, it is clear from all the authorities, that he could demand neither contribution nor substitution. To allow either might be to destroy countervailing equities existing in his former partners.

But there is another ground which we think fatal to this application. Mr. Roseberry purchased the real estate of James Wren, subject to the judgment of the Miners' Trust Company Bank. Assignees in bankruptcy take the property of the bankrupt, subject to the liens legally and *bona fide* existing as against him: James on Bankruptcy, 43. The 14th section of the bankrupt law authorizes the assignee to sell the real estate subject to a mortgage, lien or other incumbrance. An assignee in bankruptcy succeeds to all the rights and interests of the bankrupt, to precisely the same extent that the bankrupt himself had, subject to and affected by all the equities, liens and incumbrances existing against them in the hands of the bankrupt, and the same rule applies to the purchaser at assignee's sale of the bankrupt's effects: *Strong vs. Clawson*, 5 Gilman, 346. It is part of the evidence that at the sale made by the assignee in bankruptcy of Mr. Wren, verbal and written notice was given of the existence of the judgment of the Miners' Trust Company Bank. Mr. Roseberry acknowledges it to be a sub-

sisting lien in his petition. That his purchase was made subject to this judgment is clear. What, then, is the legal position of the purchaser? The authorities seem to answer this question fully. One who purchases subject to a prior mortgage and pays it off does no more than his duty. Taking an assignment is fruitless for the purpose of collecting the amount from the mortgagor's assigned estate: *Cooley's Appeal*, 1 Gr. 401. In *Hansell vs. Lutz*, 8 H. 284, the court says: the land was sold by the sheriff charged with the payment of the mortgage. How would this be usually and naturally understood? Unquestionably that the purchaser shall discharge the mortgage, and not that he will do it if the mortgagor should fail to pay his bond. On this account the land always sells for at least the measure of the mortgage debt less than its value. Hence it follows that the purchaser in thus buying the land, undertakes the duty of paying the mortgage, not personally, but so far as the land is sufficient for that purpose. It follows also, that if the obligor pay the debt, he may claim subrogation to the mortgage, else the purchaser would unjustly hold the land without having paid the entire consideration. This is explicit. Mr. Roseberry has virtually retained purchase-money to the amount of this judgment. In paying it he succeeds to no right of contribution or substitution. He stands in no better attitude than if he had bought this real estate at private sale, with an obligation on his part to pay the liens against it.

Rule discharged.

John W. Ryon, Lin Bartholomew, A. W. Schalck, and J. W. Roseberry, Esqs., for rule.

William B. Wells, Esq., and Whitney & Wells, for Noble and Rhoda. Messrs. Hughes & Farquhar, for Miners' Trust Company Bank.

John W. Bickel, Esq., for L. C. Dougherty, the assignee.

[Leg. Int., Vol. 30, p. 288.]

SAMUEL LONG vs. JOHN SHELLEY.

A judgment of a justice of the peace affirmed or reversed on *certiorari* is final, and execution can issue out of the Court of Common Pleas for the debt, interest and costs, when affirmed, and for the costs when reversed, under the act of 1810.

The record need not be remitted to the justice except where the proceedings are non prossed.

Motion to set aside the extension. Opinion delivered by

WALKER, J.—This suit, brought before a justice of the peace, was removed into the Common Pleas by the defendant upon a writ of *certiorari*. After argument, the judgment of the justice was reversed by the court, and the defendant issued execution for the costs. A motion was made by the plaintiff to set aside the writ on the ground that no execution can be issued under the 25th section of the act of 20th of March, 1810 (Purdon's Digest, vol. 1, p. 608, pl. 29), until the final disposition of the case upon a second trial before the justice. This is the sole point.

On the affirmance or reversal of a judgment removed into the Common Pleas by *certiorari*, the record is not remitted to the justice (as in cases of writs of error to inferior courts), but execution issues at once

from the Common Pleas for the debt, interest and costs, when it is affirmed; and when the judgment is reversed, for costs only, *without referring the cause again to the justice*: Troubat & Haly's Prac., vol. 1, part 2, p. 716; *Robbins vs. Whitman*, 1 Dallas, 410; *Silvergood vs. Storrick*, 1 Watts, 532.

This is the invariable rule, with the exception where the *certiorari* is non prossed, in which case the record must be remitted to the justice to be proceeded in, *for the non pros. is not final*. In this respect there is no difference between *certiorari* and writs of error: *Welker vs. Welker*, 3 Pa. Rep. 24. *The reversal here, however, is a final determination of this suit*. See act 20th March, 1810, section 22, Purdon's Digest, vol. 1, p. 608, pl. 27; and no writ of error can issue thereon: Purdon's Digest, 608, pl. 27; 7 Wright, 111. And it is in the nature of a judgment for defendant for the amount of the costs: See British Statutes, Roberts' Digest, 129, and Troubat & Haly, vol. 1, part 2, p. 734. The act of parliament passed in the 4th year of James I., chapter 3, gives costs to the defendant in all actions brought in any court if non prossed, or judgment be entered for defendant, where the plaintiff, if successful, would be entitled to costs: Roberts' Digest of British Statutes, 129 and 130. A judgment affirmed on *certiorari* becomes a judgment of the Common Pleas, and there it can be enforced: *Essler vs. Johnson*, 1 Casey, 350. After this, if the plaintiff desires to institute another suit before the same or another justice of the peace, under that section of the act of 1810 above referred to, and shall obtain a judgment equal to or greater than this present judgment, then he will be entitled to costs under the act, and these costs may be recovered before a justice of the peace in the same manner as sums of a similar amount are recoverable.

Motion discharged.

F. W. Bechtel, Esq., for plaintiff.

George D. Haughawout, Esq., for the defendant.

[Leg. Int., Vol. 30, p. 296.]

COMMONWEALTH OF PENNSYLVANIA *ex rel.* WM. QUIRK *vs.* ANTHONY LALLY.

The officers of the borough of Ashland must be qualified electors of the borough, and if any officer during his term ceases to be an elector, as by removal from the borough, he also ceases to be one of its officers.

Opinion delivered by

PERSHING, P. J.—The borough of Ashland is incorporated under the general borough law of 1851. The 18th section of that act provides that electors only shall be "eligible to borough offices." The same act provides, that in case of the death, resignation, removal, or refusal to serve, of any one elected to a borough office, the burghess shall issue his precept to the high constable, to hold an election to supply such vacancy, giving at least eight days notice, by six advertisements, set up in the most public places of said borough.

On the 6th of February, 1872, an act was passed by the Legislature, by which "the qualified electors of the borough of Ashland are authorized and required, at the next election for borough officers for said borough, and annually thereafter, to elect one person as borough treas-

urer," who (§ 2), before entering on the duties of his office, "is required to take" the oath or affirmation now prescribed in the case of borough officers of said borough. At the last borough election, William Quirk, the relator, was elected to the office of treasurer, being at that time an elector of the borough of Ashland. He subsequently removed from the borough, and did not take the oath of office prescribed by law, till after his removal. Mr. Quirk claims that he is now the legally qualified treasurer of Ashland borough, and on his petition a writ of alternative mandamus has been issued to Anthony Lally, the collector of taxes for said borough, commanding him to pay over the moneys collected by him as taxes, to the said William Quirk, or to show cause why the same should not be paid to said Wm. Quirk, as treasurer of said borough.

The answer of the respondent substantially is, that the office of borough treasurer cannot be held by one who is not an elector of the borough. We think this answer is correct. We are of the opinion that when Quirk removed beyond the boundaries of the borough, he no longer had any legal right to hold the office of borough treasurer. The distance to which he removed can have no bearing on the question of his right to the office. If he can live in the adjoining township, and still retain the office of treasurer for Ashland borough, his removal to a distant part of the county, or to some other section of the State, would not deprive him of his right to enjoy the emoluments of the office. The peculiar duties of this office require that the officer shall be easily accessible. It is true, as stated in the argument, that the act of assembly making the treasurer elective, is silent as to where that officer shall reside; but this act must be construed in reference to the general borough law under which Ashland borough exercises corporate powers. It enlarges the number of officers to be elected by a popular vote, but it does not repeal the provision that none but electors shall be eligible to borough offices. We cannot suppose that it was intended to except the office of treasurer from the general rule. A construction of the law which would allow a non-resident to be elected to this office, or allow one to hold the office, who, although eligible at the time of his election, afterward became a non-resident of the borough, would be doing violence to the plain intention of the act of assembly, as well as injustice to the people of the borough of Ashland. Such a construction must be reached by the use of positive language, and not by the silence of a statute which simply increases by one the number of the officers of the borough, who are to be elected by a vote of the qualified electors. We think that a vacancy exists in the office of the treasurer of the borough of Ashland, and that the general law under which the borough is incorporated, points out the way to fill it. The conclusion to which we have come is, that an officer of a borough must be, at the time of his election, a qualified elector of the borough; and if at any time during the term for which he may be elected, he, by his voluntary act, ceases to be an elector of the borough, by the same act he also ceases to be one of its officers.

It is ordered that the alternative mandamus be dismissed, and the respondent have his costs.

[Leg. Int., Vol. 30, p. 312.]

LEWIS C. DOUGHERTY, EXECUTOR, SAMUEL J. POTTS, TRUSTEE, vs.
MARGARET MURPHY.

It is too late to amend a bill in equity, after bill, answer, replication, reference to master, and examination of witnesses.

In equity. Opinion delivered *September 3, 1873*, by

PERSHING, P. J.—In this case there has been a bill, answer, replication, and reference to a master, by whom the testimony of the witnesses on the part of the complainants has been taken. It is now proposed to amend the eighth paragraph of the bill by striking out certain words and inserting others in their place. Can this be done? The 50th rule of equity practice forbids a plaintiff from withdrawing his replication for the purpose of amending the bill, except upon an order of a law judge of the court, upon notice to the other parties, etc., and, as we understand the rule, upon proof by affidavit that the matter of the proposed amendment could not, with reasonable diligence, have been sooner introduced into the bill. The plaintiffs have not offered to withdraw the replication, nor is it claimed that the reasonable diligence required by the rule has been exercised. The amendment proposed consists of matter which has all along rested in the knowledge of the plaintiffs, and the defect in the eighth paragraph in complainants' bill was indicated in the opinion of the court, heretofore filed in a preliminary stage of this case, and afterwards in the answer of the defendant. Anything like reasonable diligence would have informed the complainants of the necessity of the amendment now proposed, before the replication was filed, and the appointment of a master. When the complainant files a replication to the answer after he is apprised of the necessity of an amendment to his bill, he precludes himself from making such amendment: 1 Smith's Chan. Pr. 299, n.

Chancellor Kent, in the case of *Thorn vs. Germand*, 4 Johns. Ch. R. 363, held that it was a fatal objection to a motion to amend that a single witness had been examined in the cause. He says: "After replication filed, the bill cannot be amended, but by withdrawing the replication; and the materiality of the amendment, and the reason for its not being stated before, must be shown satisfactorily to the court. If a witness has been examined, the pleadings cannot be altered but under very special circumstances, except to add parties."

The bill cannot properly be amended when the parties are at issue and witnesses have been examined: Dan. Ch. Pr. 1654, cited in Brightly's Equity, section 824. The affidavit to support the application for amendment must set forth its materiality, and that it could not with reasonable diligence have been introduced: Smith's Chan. Pr. 299; 2 Johns. Ch. R. 426. No such affidavit has been filed in connection with this application. It thus appears from the authorities that if every other obstacle were out of the way, the fact that witnesses have been examined by the master appointed by the court in this case is fatal to his motion.

We have not overlooked the act of 20th of May, 1864, the second section of which (Purdon's Digest, 601, pl. 71) provides, that "in all

proceedings in equity, according to equity forms, the several District Courts and Courts of Common Pleas in this Commonwealth, may permit, at their discretion, and when in their opinion the same will affect the merits of the matter in controversy, and expedite justice, amendments to be made in bills, answers, pleas, or other matters, in the same manner as now obtained in common law cases and practice, etc." Without discussing the extent to which amendments could be made under the statutes in existence at the time of the passage of this act, we are of the opinion that no one of them, nor all together, would cover the amendment which complainants now ask to have inserted in their bill. Permission to amend is therefore refused.

[Leg. Int., Vol. 30, p. 312.]

COMMONWEALTH OF PENNSYLVANIA *ex rel.* DANIEL SHEPP *et al.* vs.
HENRY KEPNER, Chief Burgess of the Borough of Tamaqua.

The burgess of a borough incorporated under the general borough law of 1851, has no right to act as a member of the town council, and cannot refuse to sign ordinances regularly passed by the town council, on the ground that he was not present as a member when they were adopted.

Rule to show cause why a peremptory mandamus should not issue.

Opinion delivered *September 3, 1873*, by

PERSHING, P. J.—Upon the petition of complainants in this case, who constitute the town council of the borough of Tamaqua, the court granted a rule to show cause why a peremptory mandamus should not issue to the respondent, as the burgess of said borough, commanding him to sign certain ordinances, passed by the town council, and which are set forth at length in complainants' petition.

The respondent, in his answer, admits that he refused to sign the ordinances mentioned in the petition, and justifies his refusal on the several grounds that the legislative power of said borough is not vested in the town council alone, but in the corporate officers of said borough, of which the chief burgess is the principal; that as the chief burgess he has the right to act as a member of the town council, and to preside over its deliberations; and that in no other way can he be certified, or have legal knowledge of what ordinances, etc., have passed that body, and avers that the complainants in organizing as a town council by the election of one of their own number, viz., Daniel Shepp, as president, was and is an illegally constituted borough council.

The petition and answer raise but a single question, viz., has Henry S. Kepner, the respondent, as burgess of the borough of Tamaqua, the right to act as a member and president of the town council of said borough?

The borough of Tamaqua was incorporated by the act of 8th April, 1833, P. L. 326 the 13th section vested "full power and authority" in the town council to make and enact all ordinances, rules and regulations for the government of the borough. It was made no part of the duty of the burgess to sign these, but he had (§ 15) the power and authority to carry them into effect. The council elected its own president, and it is conceded that under that charter, the burgess was not a member of that body. On application made for that purpose, the borough

of Tamaqua has since been made subject to the act of April 3, 1851, entitled "An act regulating boroughs." The second section of this act provides that "the powers of the corporation shall be vested in the corporate officers designated in the charter," following which is a schedule of these powers. It is contended that under this section the burgess has a right to preside over the town council, as a member of it, although nowhere in the act of 1851 is this power given him in express terms. The high constable is a corporate officer, designated in the charter, and the construction of this section contended for by respondent's council, would also make him a member of the town council of this borough. Nothing in the act of 1851 specifically enumerates the powers of the town council as such, but the 5th section does enumerate the powers, and the 6th section the duties of the burgess, and in neither is it provided that he shall have the right to act as a member of the town council. That which might otherwise have been implied, must cease in view of what is expressed in these sections. The third paragraph of the 6th section makes it the duty of the burgess "to sign the several by-laws, rules, regulations and ordinances adopted after they shall have been duly and correctly transcribed by the secretary."

The complainants in their petition allege that the ordinances therein mentioned and set forth, were duly and correctly transcribed by the secretary of the council, and signed by him and the president of the town council, before they were presented to the burgess for his signature. Both of these officers discharged their duties under oath, and we cannot presume that they would present to the burgess for his signature, ordinances and by-laws which were not correctly transcribed, nor is it claimed by the respondent that this has been done.

As this is purely a question of construction, we are greatly aided by a reference to two acts of assembly, the one passed long before the act of 1851, the other long since the act of April 1, 1834, "to provide for the incorporation of boroughs," does not require the burgess to sign by-laws and ordinances, but enacts in the eighth section, that "the burgess shall be president of the town council, and shall have and exercise all the rights and privileges of a member thereof." The omission of this clause from the general borough act of April 3, 1851, could not have been accidental. Looking at the new powers vested in, and the duties imposed on the burgess of a borough by the act of 1851, it seems clear that it was the legislative intention that the burgess and town council should act separately from each other, and that the 8th section of the act of 1834 was swept away by the repealing clause of the general borough law of 1851.

The other act to which we have referred is entitled "An act for the further regulation of boroughs," and was passed June 2, 1871. The second section enacts that "the several courts of the Commonwealth having jurisdiction to incorporate boroughs, may, in granting an incorporation, or upon application made to them for the purpose, fix or change the charter of any borough, so as to authorize the burgess or chief executive officer thereof, to serve as a member of the town council, with full powers of such, and to preside at the meetings thereof." This applies, as will be seen by the first section, to boroughs incorporated under the acts of 1834 and 1851. If the act of 1851 authorizes the burgess of a borough to act as a member of the town council, and to

preside over it, this legislation, so far at least, as it applies to boroughs incorporated under that act, is not only twenty years behind time, but is wholly unnecessary. As a legislative construction of the borough law of 1851, it is against the position taken by the respondent in this proceeding. We hold that Henry S. Kepner has no right to act as a member of the town council of Tamaqua borough, by virtue of his election as burgess, and that he did not preside over that body when the ordinances to which he refuses his signature were adopted furnishes him no sufficient legal excuse for refusing to sign them.

Rule absolute.

H. B. Graeff, Esq., for relator.

Hughes & Farquhar, Esqs., for the respondent.

[Leg. Int., Vol. 30, p. 330.]

• DANIEL FELTY vs. WILLIAM UHLER & JACOB STEIN.

An act of assembly authorizing taxation for the payment of bounties previously paid is constitutional.

The power of the Legislature to tax for public good and for public purposes extends even retrospectively to all matters not penal, not in violation of contracts, and not forbidden by the constitution.

In equity. Opinion delivered by

WALKER, J.—This was a bill in equity praying the court to grant a special injunction against the defendants to prevent the collection of a special bounty tax of 3½ per cent., levied by the school board of Pinegrove township for the year 1865, upon the complainant's property.

The bill sets forth that the complainant is the owner of certain real estate in West Pinegrove township school district, and is now charged with its ratable proportion of the public taxes on real and personal estate in said township, for State, county and township purposes, and for school purposes he is charged with his ratable proportion for West Pinegrove independent school district.

That the school directors of Pinegrove township have levied this special bounty tax in addition, and have issued their duplicates to Jacob Stein, who is proceeding to collect the same and make a levy on the personal property of the complainant, and that the president of the board is urging the collector to proceed and collect said tax.

That this special bounty tax is unjust and illegal, and that the directors have no power or authority in law or equity, to levy or collect the same, and have no jurisdiction in the independent school district of West Pinegrove, where the complainant resides. He therefore asks for equitable relief by injunction, etc.

The defendants reply to this, by saying that under the act of assembly of 23d March, 1865, P. L., page 593, the school directors of the several school districts of Pinegrove township are authorized to levy and collect a tax in addition to the tax now authorized by law, for the purpose of paying \$8,000, incurred in raising bounties for volunteers, under the call of the President of the United States in 1864 for 500,000 soldiers to fill the army.

That the required number of men to fill the quota of Pinegrove township could not be obtained without payment of bounties to volunteers,

and that it was determined by the people of the township, in public meetings, that as the money could not be raised by private contribution, it must be done so by taxation—it was agreed that some of the principal taxpayers should borrow the money, which was accordingly done, and this act was passed to refund the money thus obtained in good faith.

The questions now raised are—

1. *As to the power of the directors to levy this tax.*

2. *As to the constitutionality of the act of 1865.*

The evidence establishes the fact that this tax was levied by consent of a majority of the school directors of Pinegrove school district, and West Pinegrove school district (forming Pinegrove township), acting as trustees for the people in the respective school district, and it should be sustained, if the law under which they acted is not unconstitutional. That is the true question. It has been repeatedly sanctioned by the court that, under our present constitution, the power of the Legislature to impose taxes for the public good, and for public purposes, is without limit, and may be extended to all kinds of property. (As to their power to pass *ex post facto* laws with reference to penal offences or vested rights, it is not contended for): See *Calder vs. Bull*, 3 Dallas, 386.

For instance the Legislature may impose taxes for educational purposes in maintaining the common school system, whereby one man is taxed to pay for the education of the children of other parents: *Commonwealth vs. Hartman*, 5 Harris, 118.

To make an act of assembly void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly, as to leave the case free from all doubt. The power of the Legislature with reference to taxation is limited *only* by their own discretion. For the abuse of it, members are accountable only to their constituents: *Sharpless vs. Mayor of Philadelphia*, 9 Harris, 147. Black, C. J., in this last mentioned case, most forcibly says: "We can declare an act of assembly void, only, when it violates the constitution *clearly, palpably, plainly*, and in such a manner as to leave *no doubt*," or hesitation in our minds. This principle is asserted by judges of every grade, both in the federal and State courts, and by some it is expressed with great solemnity: 6 Cranch, 87; 4 Dallas, 14; 3 S. & R. 178; 12 S. & R. 339; 4 Binney, 123.

"Equality of taxation is not enforced by the bill of rights:" *Kirby vs. Shaw*, 7 Harris, 258.

"So when a moral obligation exists, the Legislature may give it legal effect:" *Lycoming vs. Union*, 3 Harris, 166.

"A law that is unconstitutional is so because it is an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or State constitution:" *Commonwealth vs. Maxwell*, 3 Casey, 444.

"When a right exists and no remedy to enforce it, it is within the constitutional power of the Legislature to provide one:" *The Turnpike Company vs. The Commonwealth*, 2 Watts, 433.

So much as to the general power of the Legislature to impose taxes.

In this case the averments in the answer are, that the school districts were unable to procure the requisite number of volunteers to fill the quota to avoid the draft, and that the citizens held a public meeting and agreed to ask the Legislature to pass an act to enable them to raise the

money to pay bounties to volunteers by special taxation. And that after this was done the money was advanced by certain citizens on the faith of this public expression of sentiment, and with the understanding that the amount so advanced should be refunded to them when the law was passed and the money collected. The money was then advanced for that purpose. These are the facts, and there is every reason why we should hold this law operative both in law and equity.

These views are confirmed by the decision of *Weister et al. vs. Hade*, 2 P. F. S. 474, which is a case in question where the bounties were first paid to the volunteers to avoid the draft and the money afterwards raised by taxation.

It is there ruled, "*That the power of the Legislature to lay taxes for the public good extends even retrospectively to all matters not penal, not in violation of contracts and not forbidden by the constitution, and can act directly on individual rights, although remote and indirect.*"

In *Speer vs. The School Directors*, 14 Wr. 150, it is held that "a tax law is to be considered valid unless it be for a purpose in which the community taxed has palpably no interest, and when it is apparent that the burden is imposed for the benefit of others than the public, and for another than the public interest.

"It is a matter involving the public welfare and interest that the quota of troops, called for from a municipal district under an impending and unexecuted draft, should be filled by volunteers. Hence the payment of bounties to volunteers to enable a borough to fill its quota under a call for troops and an anticipated draft is a legal payment as for a purpose of a municipal and public nature, and an act of assembly authorizing the borough authorities to receive money for such purposes by loans and taxation is constitutional."

This doctrine is affirmed in *Ahl vs. Gleim*, 2 P. F. Smith, 432. The same doctrine is held in *Morgan vs. Commonwealth*, 5 P. F. S. 456. (See also *Booth vs. Woodbury*, 32 Conn., 118 per Butler, J.) In *Cunningham vs. Mitchell*, 17 P. F. S. 78, it is decided that "when acts of assembly gave authority to school directors to levy taxes to pay bounties to volunteers (and having jurisdiction of the subject-matter), their warrant to the collector was his justification, even though the previous proceedings were irregular. These decisions are conclusive on this subject. The injunction is, therefore, refused, and the bill dismissed at the costs of the plaintiff.

Messrs. *William R. Smith* and *B. W. Cumming*, for plaintiff.

John Bannan, *F. W. Hughes*, *T. R. Bannan*, and *J. W. Ryon*, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 352.]

EMILY T. ECHERT *et al.* vs. VALENTINE FERST *et al.*

Cutting timber on the land of another, without color of title, is destructive to the freehold, and may be denominated *destructive trespass*.

Equity will enjoin against the commission of such acts, when the party is insolvent, and where it is necessary to prevent a multiplicity of suits.

In equity. Opinion delivered October 23, 1873, by

WALKER, J.—This bill in equity sets forth that the complainants

are the owners of 115 acres of timber land, with allowance, situate in Pinegrove township, Schuylkill county. That the defendants are the owners of the adjoining land, and are knowingly and wilfully engaged in cutting down and removing the timber trees from the land of the complainants. That said land is only valuable and useful for the timber. That the defendants are persons of insufficient means to answer in damages, for the injury already done and which they are still doing, and that a judgment against them would be entirely fruitless.

Upon the presentation of this bill at chamber, a preliminary injunction issued, and the court fixed the 25th of July, 1873, for the hearing, which was continued to suit the defendants until the 23d of September, 1873, at which time it was ably argued by counsel. The affidavits read support these facts.

The question now is, whether upon these facts, the injunction shall remain.

The writ of injunction is a high prerogative, to be exercised with great caution, and only for the prevention of irreparable injury, and where no legal adequate remedy exists: *New Boston C. & M. Co. vs. The Pottsville Water Co.*, 4 P. F. S. 164; *Clark's Appeal*, 12 P. F. S. 447.

If neither of these exist, a court of chancery will not interfere, but will turn the party over to his action at law for his redress.

"Whether the injury complained of be irreparable or not, is a conclusion of law for the chancellor from the peculiar circumstances:" Hilliard on Injunctions, 350, sec. 3. And the facts that show the nature of the irreparable injury must appear in the bill; a mere general averment is not enough: *Chesapeake and Ohio Co. vs. Young*, 3 Md. 480; *Adams' Equity*, 210, and notes. And what is meant by "*irreparable damage or mischief*," is defined by the Supreme Court in *Commonwealth vs. Pittsburgh and Connellsville Railroad Co.*, 12 Harris, 159. Nor will the relief be withheld because the bill omits to charge the injury as irreparable, if sufficient facts are alleged to satisfy the court that such is the case: *Davis vs. Reed*, 14 Md. 152; *Higginson on Injunctions*, 464.

On the part of the defendants it is contended:

1. That the damage complained of is not irreparable.
2. That an adequate remedy exists at law.
3. That injunctions to prevent waste only lie at the instance of the remainder-man, mortgagee, or one having the ultimate interest in the land.

4. That injunction is not the remedy for a criminal act.

1. An injury is irreparable where it is not susceptible of any adequate compensation in damages, or where from its continuance a permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented: Hilliard on Injunctions, 25, § 31. The bill sets forth and the affidavits support it, that the land is only valuable for the timber, which the defendants are cutting down and carrying away. The timber is a part of the real estate (9 Wr. 121), and every tree cut diminishes the value of the land. It is also alleged that the defendants are insolvent. If they be insolvent, and are allowed to take the timber away, the conclusion of law necessarily follows that the damage to the plaintiffs is not susceptible of adequate compensation, and the injury irreparable.

2. Is there an adequate legal remedy? An action of trespass can be sustained for every renewed cutting. This would increase litigation, and would be insufficient to prevent the wrong complained of. This appears to be the only proper remedy of the complainants.

3. That an injunction to prevent waste is the usual remedy of the remainder-man, mortgagee, and one having the ultimate interest in the land (Hilliard on Injunctions, 353, § 3; 2 Blackstone's Com. 281), yet injunctions to prevent *destructive trespass* have of late years obtained, especially where there have been repeated acts and trespasses: *Coulson vs. White*, 3 Atkyns, 21; *Scheets' Appeal*, 11 Casey, 88; *Stewart and Foltz' Appeal*, 6 P. F. S. 413.

The interference of equity in cases of waste is a wholesome jurisdiction to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court: *Kane vs. Vanderburgh*, 1 Johns. Ch. 11; Hilliard on Injunctions, 352. That injunctions may issue to restrain trespasses, under color of right, seems to be at length settled: *Mitchell vs. Dors*, 6 Vesey, 147; *Twort vs. Twort*, 16 Vesey, 130; *Earl of Cowper vs. Baker*, 17 Vesey, 128; *Thomas vs. Oakley*, 18 Vesey, 186; *Courthope vs. Mapplesden*, 10 Vesey, 291; *Hanson vs. Gardiner*, 7 Vesey, 309; *North Union Railway vs. The Bolton & Preston Railway Company*, 3 Railway and Canal Cases (Carrow & Oliver), 345.

The destruction of timber on complainant's land, where such timber is necessary for the use and enjoyment of property, is enjoined in Maryland: *Davis vs. Reed*, 14 Md. 152; High on Injunctions, § 464. In Connecticut, where the title is unquestionable, relief as against a trespasser without color of right will be granted: *Falls et al. vs. Tibbetts*, 31 Conn. 165. Equity will interfere to prevent destruction to inheritance even though both title and possession are in dispute: *Cornelius vs. Post*, 1 Stockt. 196; *Spear vs. Cutter*, 5 Barb. 483. Chancery does not treat questions of destructive damage now exactly as it did forty or fifty years ago: *Haigh vs. Jaggard*, 2 Coll. 234 (33 Eng. Ch. Rep.) The change has been marked since the *Flanagan Case*, reported in 7 Vesey, 308.

4. There is a difference between an injunction to prevent waste and one to prevent a trespass. The law is settled that for a criminal act an injunction will not be granted: Hilliard on Injunctions, 2, § 1; *Mayor vs. Thorne*, 7 Paige, 264. Unless the trespasser be insolvent, or the injury irreparable and destructive to the plaintiff's estate, and such as calls for immediate relief: *Morse vs. Massini*, 10 Min. 590; Hilliard on Injunctions, 345, § 1. These objections are therefore not sustained under the authorities cited.

The complainants urge that as these repeated trespasses to their freehold, denominated *destructive trespass*, can only be prevented by injunction, and that the insolvency of the defendants they urge is a legal ground for the writ. Destructive trespass is defined to be damage amounting to destruction to the inheritance done by a stranger, whose possession or entry is unlawful (Adams' Equity, 209), and it is a more appropriate term in the present case than waste. Trespass upon real estate in *Crockford vs. Alexander*, 15 Vesey, 138, the lord chancellor terms "destruction." In *Smith vs. Collyer*, 8 Vesey, 90, Lord Eldon remarked, "it was always surprising to him, that the jurisdiction by injunction was taken so freely in waste, and not in trespass, for there is a writ at

common law after action to restrain waste, but a trespass after one action may be repeated." It does seem to me that when irreparable damages must ensue, there is more reason for granting an injunction to prevent destructive trespass, than to prevent waste, for the reason of the common law remedy after action.

In case of insolvency an injunction will be granted. So when it is to prevent waste and avoid multiplicity of suits: *Spear vs. Cutter*, 5 Barb. 487; Hilliard on Injunction, 355, § 4, per Paige, J.; see Chief Justice Wright's opinion in *Cowles vs. Shaw*, 2 Clarke (Iowa), 496; see, also, *Hawley vs. Clowes*, 2 Johns. Ch. 122; *Hart vs. Mayor*, 3 Paige, 213; *Winnepissiogee Lake Company vs. Worster*, 9 Foster N. H. 449; *James vs. Dixon*, 20 Mo. 79; *Shipley vs. Ritter*, 7 Md. 408; *Cobb vs. Smith*, 16 Wis. 661; 2 Story's Equity Jur., § 925, *et seq.*; Adams' Equity, 210. So an injunction was granted when the defendant was a pauper, although a legal remedy existed: *Hodson vs. Duer*, 2 Jurist, 1014.

Lord Hardwicke held as early as 1743, that every trespass is not a foundation for an injunction, but repeated trespasses become a nuisance and may be restrained: *Coulson vs. White*, 3 Atk. 20. For such injury is not reparable in an action for damages, besides that it would be required to be followed up by a successive action. "This," Judge Sharswood says, "is a well-recognized distinction." *Mason's Appeal*, 20 P. F. S. 30.

The 13th section of the act of assembly of 16th June, 1836 (Purdon's Digest, 591), which extends the jurisdiction of equity to "the prevention or restraint of acts contrary to law and prejudicial to the interests of the community or the rights of individuals," applies to waste by cutting down and removing timber: *Denny vs. Brunson*, 5 C. 382. (See act 14th February, 1857, pl. 39, Purdon's Digest, 592, pl. 8, extending equity powers to the State in general.)

When trespasses are constantly recurring and threatened to be continued, they may be redressed by injunction. *Stewart and Foltz's Appeal*, 6 P. F. S. 413. See also in *Smith and Fleck's Appeal*, 19 P. F. S. 479, before cited, Judge Williams decided that cutting down timber to the injury of the inheritance, being waste, may be restrained in equity.

Chancellor Kent held that injunctions will be granted to prevent trespass as well as to stay waste, where the mischief will be irreparable, and to prevent a multitude of suits. *Livingston vs. Livingston*, 6 Johns. Ch. 497; *Watson vs. Hunter*, 5 Johns. Ch. 169.

Judge Paige, in *Spear vs. Cutter*, 5 Barb. 486, remarks, "that courts of equity originally declined to interfere by restraining waste or trespass where the right was doubtful or the defendant was in possession, claiming by an adverse title (4 Johns. Ch. 22; and Story's Eq. Jurisprud., § 918), but such courts have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land where the title is in dispute and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from their responsibility to the defendant, or otherwise, the plaintiff cannot obtain relief at law; and to sustain this position he cites *Hart vs. Mayor*, 3 Paige, 214; *Winship vs. Pitts*, 3 Paige, 261; 2 Johns. Ch. 122. "Trespass," says Mr. Justice Baldwin in the case of *Bonaparte vs. The Camden & Amboy Railroad Company*, 1 Baldwin, 205, "is destruction in the eye of the law

when there is no privity of estate; it (equity) prevents its repetition or continuance, protects the right—arrests the injury and prevents the wrong; this is a more beneficial and complete remedy than the law can give, and, therefore, the proper one for a court of equity to administer:" 9 Wheat. 842; 1 Ves. 189; 2 Johns. Ch. 122.

The decisions of the different States on this question are not in all respects uniform (see *Stevens vs. Beckman*, 1 Johns. Ch. 318, and others), but from the current of authorities, English and American, we may safely conclude that equity will not lend its aid to restrain a criminal or penal offence.

But where the trespass is destructive to the real estate amounting to irreparable injury; when there is no adequate legal remedy; when the title in the plaintiff to the land is complete and the wrongdoer is insolvent; when it is to prevent waste to the inheritance, and when a multiplicity of suits must be the result of legal proceedings; in all such cases equity will enjoin to prevent the injury complained of. It is evident, from the facts, that this case falls within the adjudged cases, and that the plaintiffs are entitled to equitable relief. Even if the offence of cutting timber had not been passed upon, and the remedy by injunction clearly and repeatedly decided by our own courts, and the courts of the several States, I should still be inclined to grant the relief prayed for; for no vested right of the defendant is determined in this application, and no injury can result from their ceasing to cut timber for the present, until the title is established, for, as has been said by a distinguished writer upon equity jurisprudence (Willard Eq. Juris. 408), "*the extent to which the jurisdiction may be carried is not marked out by any adjudged case, and from the nature of things it must forever remain undefined.*" Hilliard on Inj. 17, § 13. Under the English practice, with which we are gradually assimilating, the powerful aid of equity may be invoked to redress the variety of recurring acts and never ending grievances of mankind, where the object is the prevention of irreparable damages, and where no legal remedy exists. If it were not so, it would be no more efficient than law, which, by reason of its universality, has long since been found deficient and unequal to the full and complete administration of justice.

And now, to wit: October 20, 1873, it is, therefore, ordered, adjudged, and decreed, that the special injunction issued in this case, prohibiting the defendants from cutting timber on the land of complainants, remain until further ordered.

George R. Kaercher and R. L. Ashhurst, Esqs., for plaintiff.
Messrs. Hughes & Farquhar, for defendants.

[Leg. Int., Vol. 30, p. 381.]

COMMONWEALTH *ex rel.* HENRY S. KEPNER *vs.* DANIEL SHEPP.

1. The chief Burgess of a borough has the right to take proceedings in the nature of a *quo warranto* to oust a councilman under the act of 1860, for being interested in a contract for furnishing materials to said borough. He has a sufficient interest to make him a competent relator.
2. A member of a town council, who is charged in a suggestion in the nature of a *quo warranto*, with having an interest in a contract for furnishing supplies to the borough of which he is an officer, must, in his plea, disclaim or justify. If the plea contain nothing of substance, if no material issue could be formed upon it, judgment will be given upon the record, as if the bad plea had no existence.

Quo warranto. Opinion delivered by

PERSHING, P. J.—This is a *quo warranto* prosecuted by the Commonwealth at the relation of Henry S. Kepner, chief burgess of the borough of Tamaqua, against the defendant, Daniel Shepp, and requires the latter to show by what authority he claims to exercise the office of councilman of said borough. The material matters alleged in the suggestion are, that the defendant since the 5th day of August, 1873, has exercised, and still does exercise, the franchises, rights, and privileges of a member and president of the town council of said borough of Tamaqua; that on the day last aforesaid the said Daniel Shepp was interested in a contract for the furnishing to said borough of supplies and materials, to wit, in a contract for the furnishing of timber for the cribbing of Washington street, in said borough, whereby the said Daniel Shepp, according to the provisions of the act of assembly of said Commonwealth, approved the 31st day of March, A. D. 1860, entitled "an act to consolidate, revise, and amend the penal laws of this Commonwealth," forfeited his said membership and office. By section 66 of the act referred to in the suggestion (Purdon's Digest, 334, pl. 95), it is made unlawful "for any councilman, burgess, trustee, manager, or director of any corporation, municipality, or public institution, to be in anywise interested in any contract for the sale or furnishing of any supplies or materials, to be furnished to or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions or either of them, shall forfeit his membership in such corporation, municipality, or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding five hundred dollars." The defendant in his plea admits that he has since the 5th day of August, A. D. 1873, exercised, and still does exercise, the franchises, etc., of a member and president of the town council of the borough of Tamaqua, and as a defence to the averments contained in the suggestion, alleges, "That the relator is but a private individual, holding no relation by virtue of his office of chief burgess to entitle him to sue in the name of the Commonwealth, nor in anywise compel the said Daniel Shepp by the law of the land to make answer thereto;" and further, that "the defendant does not admit that he was interested in a contract for the furnishing to said borough of supplies and materials as stated in the suggestion filed, but denies that he has by anything done in his office, or by reason of the suggestion and the matters therein contained, forfeited his said membership and office." To this plea the relator has filed a demurrer. The first question is as to the right of Henry S. Kepner to appear as relator in the prosecution of this writ. The object of this proceeding is not like an action in which the plaintiff seeks to recover, and must, therefore, rely on his own right; but is for the purpose of excluding the defendant from the possession of an office or franchise from which the public have a right to demand his being ousted, unless he shows a complete legal title in himself: Wilcox on Corporations, 266. The objects of the statute of 9 Anne, chap. 20, the provisions of which have been

incorporated into our revised code, were, as indicated in the title, to render "the proceedings upon writs of mandamus and informations in the nature of *quo warranto* more speedy and effectual, and for the more easy trying and determining the rights of officers and franchises in corporations and boroughs." Section 4 of this statute provides, that the information in the nature of *quo warranto* might be "at the relation of any person or persons desiring to sue or prosecute the same," against any person usurping, intruding into, or unlawfully holding or executing any corporate or borough office.

In *Cole on Criminal Informations*, 172, it is said, "An application for an information in the nature of *quo warranto* will be granted only at the instance of a *competent relator*, i. e., one having a sufficient interest to warrant his interference." Our statute of 14th June, 1836, relating to writs of *quo warranto* and mandamus, has received the same construction. Judge Strong says, in the *Commonwealth vs. Cluley*, 6 P. F. S. 270, "But the statute of 9 Anne allowed informations at the relation of any person desiring to sue or prosecute them, and under that statute the rule was that a private relator must have an interest. Our act, which substantially incorporates the provisions of the British statute, has received the same construction. This court has construed the words 'any person or persons desiring to prosecute the same,' to mean any person who has an interest to be affected. They do not give a private relator the writ, in a case of public right, involving no individual grievance." The next inquiry is, what is a sufficient interest on the part of a relator to warrant his interference in a case of this kind? This question is answered by many authorities. A mere stranger to a corporation cannot, in general, be permitted to file a *quo warranto* information to impeach the title of a corporator: *Rex vs. Kemp*, 1 East, 46; *Rex vs. St. John*, 2 Selw. N. P. 1164 n., unless he can show that, as an inhabitant of a borough, he is subject to the jurisdiction of the body corporate: *Rex vs. Hodge*, 2 B. & A. 344. In *Rex vs. Brown*, 3 T. R. 574, it is held that where the application is made merely to disturb the local peace, it is right to inquire into the motives of the party to see how far he is connected with the corporation. For this our own case of *Commonwealth vs. Jones*, 2 Jones, 365, is also an authority. "But," says Ashhurst, J., in *Rex vs. Brown*, supra, "the ground on which this application is made is to enforce a general act of parliament, which interests all the corporations in the kingdom, and, therefore, it is no objection that the party applying is not a member of the corporation."

An inhabitant of a borough, who is subject and liable to be affected by the borough rates, is clearly a competent relator without being a burgess: *Rex vs. Parry*, 6 Ad. & El. 810; *Reg. vs. Quayle*, 11 Ad. & El. 508; 2 Nev. & Per. 414. A burgess or other member of a corporation is a good relator, though the affidavits disclose matters tending to dissolve the corporation: *Rex vs. White*, 5 Ad. & El. 613. Doubtless, in England, where the information is against the burgess or alderman of a borough, a corporator is held a fit relator. He has an interest: *Commonwealth vs. Cluley*, supra. In the case in hand the relator is not only an inhabitant of the borough of Tamaqua, subject to and liable to be affected by the borough rates, but he is admitted to be the chief burgess of that municipal corporation. In addition to this, this appli-

cation is to enforce a general statute, which extends to all corporations, municipalities, and public institutions of the State.

The statute of 1860, under which this proceeding has been commenced, was intended to cut up by the roots a great and growing evil, which it seemed nothing short of legislative action could reach.

The salutary effect of this legislation must not be crippled or destroyed by surrounding its enforcement with a hedge of technicality. We decide, as a question of law, that Henry S. Kepner has a sufficient interest to make him a competent relator. The second part of the plea is evasive. The suggestion specifically charges the defendant's interest in a contract for furnishing timber to the borough of which he was and is an officer, in violation of a positive statute forbidding it.

The defendant neither disclaims nor justifies, and he must do the one or the other. For him to say he does not admit he was interested in a contract, is not to deny it, and not to deny is to confess. How the defendant's meaning is to be interpreted is a matter of conjecture, when, following his plea, he denies that "he has by anything done in his office, or by reason of the suggestion or the matters therein contained, forfeited his said membership and office."

Whether this is intended to be taken as a denial that he is in anywise, directly or indirectly, interested in the contract formally set forth in the suggestion, or is intended to allege, as a conclusion of law, that if interested this will not forfeit his title to the office he holds, is only known to the defendant himself. The plea is doubtful, ambiguous, and uncertain, and thus is in conflict with almost every established rule on the subject. It is a maxim in pleading that if the meaning of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading, because it is to be presumed that everybody states his case as favorably to himself as possible. 1 Ch. Pl. 237; Ste. Pl. 333. Where the defendant pleads one insufficient plea, it amounts to a confession of the usurpation charged upon him: *Rex vs. Philips*, 1 Stra. 394. If the plea contain nothing of substance, if no material issue could be joined upon it, a repleader after a trial would be useless; judgment will be given upon the record as if the bad plea had no existence: *Tams vs. Lewis*, 6 Wright, 412, and authorities there cited.

In our opinion, no material issue can be formed on the plea filed in this case. We regard it as wholly insufficient, and therefore give judgment of ouster against the defendant.

And now, October 6, 1873, the court adjudge and determine, that the said Daniel Shepp has forfeited his office as a member of the town council of the borough of Tamaqua, by reason of the matters contained in the suggestion filed in this case, and not sufficiently denied by said Daniel Shepp, and do now adjudge that he be ousted and altogether excluded from his office of councilman aforesaid, and that he pay the costs of this proceeding. And it is ordered that a certified copy of this judgment be served by the sheriff of the county of Schuylkill upon the said Daniel Shepp forthwith, and a certified copy of the decree be also delivered by him to the clerk of the said town council of Tamaqua. Of all which the said sheriff is required to make due return.

Messrs. *Hughes and Farquhar*, for the relator.

Hon. *James Ryan*, for the defendant.

Court of Common Pleas of Somerset County.

[Leg. Int., Vol. 30, p. 69.]

NEVILLE vs. MORGAN.

A Maryland justice of the peace has not jurisdiction in attachment against a resident of Pennsylvania, for a debt contracted in Pennsylvania, the debtor not being personally present in Maryland, nor having property there.

Query? Whether if the debtor had been personally present in Maryland, and served with a summons, a Maryland judicial tribunal might not have properly refused to entertain jurisdiction of a controversy in Pennsylvania between parties domiciled here, who were only temporarily in Maryland, and had no property there?

Query? Whether, if such tribunal entertained jurisdiction because of the mere casual and temporary presence of the parties, it would not, *ex comitate*, respect and enforce the Pennsylvania statute exempting wages of labor from attachment in the hands of the employer?

Opinion and order of the court on the question of law reserved, delivered November 28, 1872, by

HALL, P. J.—The demand of the plaintiff in the case is for \$38.42, with some interest thereon, wages for work done by the plaintiff as a day laborer, in the month of October, 1870, at the Sand Patch Tunnel, in this county. The plaintiff and defendant, together with one Shannon, were residents of Sand Patch. The plaintiff, it is said, and, so far as this case is concerned, it may be conceded, was indebted to Shannon in an amount equal to the wages due to him from Morgan.

By a statute of this State, passed 15th April, 1845, section 5, it is provided that the wages of laborers shall not be liable to attachment in the hands of the employer. It was, therefore, impossible that the plaintiff's wages, now in controversy in this suit, could be legally attached by his creditor, Shannon, by proceedings in this State.

But Sand Patch is near to the Maryland line, and in order to avoid the Pennsylvania statute, Shannon, impressed with the belief that "there is no difficulty to him who wills," procured an attachment to be issued by a justice of the peace at Cumberland, in Maryland, and had it served on Morgan, who was temporarily at that place. Whether Morgan went there by design and on arrangement with Shannon to have the attachment served on him, does not appear, because it was not material to the issue to inquire.

There was no personal service of the attachment on Neville. He was not in the State of Maryland, nor had he any property there at that time.

The justice rendered "judgment of condemnation against the property attached," and soon after that Morgan paid the sum now in dispute to the justice in satisfaction of the judgment.

By the Constitution of the United States, Art. IV., section 1, it is provided that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." And an exemplification of the record of the proceedings before the Maryland justice has been produced and offered in evidence. It is claimed that this Maryland judicial proceeding and the payment of the wages thereon, is a complete bar to the plaintiff's recovery in this case.

We do not so regard the law. If Neville, the defendant in that proceeding, had been in Allegheny county, Maryland, and had been personally served, or had appeared and made defence, it is possible the position might be sustained.

Nevertheless, even in that case, there might be a question of jurisdiction. Is it not doubtful whether a Maryland judicial tribunal should entertain jurisdiction of a dispute between parties, all of whom are residents of Pennsylvania, who are temporarily in Maryland, perhaps but for a single day, and where there is no property belonging to the alleged debtor within the jurisdiction of the tribunal? The case would be that of a hungry non-resident creditor seeking the jurisdiction for the sole purpose of bringing suit against a debtor casually within the limits of the State. This would be throwing upon the courts in Maryland the adjudication of controversies arising in Pennsylvania between parties resident in Pennsylvania. Certainly the courts there were not organized for any such purpose, and might very properly decline to entertain jurisdiction.

If, however, the Maryland tribunal exercised jurisdiction by virtue of the mere temporary sojourn of the Pennsylvania parties disputant within the borders of that State, it would not do so without notice to all the parties, and then it should, and no doubt would, respect, *ex comitate*, the law of the place of contract and domicile of the parties—a beneficent statute intended to protect a laborer, and his family dependent on him for support, from the grasp of a heartless creditor, ready to exact the pound of flesh “nominally in the bond.”

We know of no reason why the Maryland tribunal (if it entertained jurisdiction) might not properly pay respect to and enforce a Pennsylvania statute in no way contravening the public interest or policy of law of the State of Maryland, between parties residents of Pennsylvania litigating a contract made in Pennsylvania.

But in the case at bar the alleged debtor (now the plaintiff) was not domiciled in Maryland, nor present within the limits of the State, nor had he any property there. Jurisdiction of the person or property of an alien is founded on his, or its, presence. Without this, the exercise of jurisdiction is an act of usurpation, and the proceedings are to be treated as a nullity: *Steel vs. Smith*, 7 W. & S. 447.

We therefore direct that the plaintiff shall have judgment on the verdict.

Court of Common Pleas of Tioga County.

[Leg. Int., Vol. 30, p. 361.]

In matter of the distribution of the proceeds of the Sheriff's Sale of the personal property of GILES MARVIN.

A husband confessed judgment to his wife and she issued a *fi. fa.* against his personal estate, which was lodged in the sheriff's hands a few moments before a creditor's *fi. fa.* Held, that she could not issue such execution.

Exceptions to report of auditor. Opinion delivered by

WILLIAMS, P. J.—The defendant, Giles Marvin, is the husband of the exceptor. She was a judgment creditor of her husband. The judgment was obtained by virtue of authority contained in the note or single bill of date May 10, 1872, for six hundred and eight dollars and fifty cents. At the time of the giving of this note, the entry of judgment thereon, the issuing of execution, and the sheriff's sale of the personal property of Giles Marvin in obedience thereto, the plaintiff was the lawful wife of the defendant. The note was payable to Mrs. Marvin herself, the judgment was entered, and the *fi. fa.* issued in her name without the intervention of a trustee or next friend. The *fi. fa.* of Mrs. Marvin was received by the sheriff on the 27th of January, 1873, at 12 o'clock m., that of Mitchell & Cameron, at 12.10 p. m., and that of John Young, at 12.15 p. m., of the same day.

There is, therefore, but a single question raised by the exceptions. It is clear that a married woman may have a judgment against her husband, without the intervention of a trustee: see *Kutz's Appeal*, 4 Wright, 90; *Williams' Appeal*, 11 Wright, 307, which as a mere security for money, loaned out of her separate estate, will be upheld as a lien upon his real estate. If, by any means, the real estate be converted into money, such judgment will be permitted to come upon the fund: 11 Wr. 307. But these cases are put upon the ground, that as the relation of husband and wife does not appear upon the record of the judgment, creditors shall not be heard to object, the legal unity of husband and wife, unless they also allege that the judgment is fraudulent.

The rule seems to be, that the husband may secure to the wife by the confession of a judgment, what he, *bona fide*, owes her out of her separate estate. He is *sui juris*. The confession of judgment is his act. It is good, therefore, against him, and it will be sustained against his subsequent judgment creditors, if it was confessed for what was honestly due. But the rule goes no further. In this case, the wife knowing her husband's situation, and the intention of his creditors, entered the race for priority, outstripped all competition and lodged her *fi. fa.* in the hands of the sheriff, ten minutes before one, and fifteen minutes before another of his judgment creditors. Upon these writs, his personal property was brought to sale, realizing \$198.75. This sum she claims by virtue of the priority of her execution. Prior to the act of 1848, it was never supposed that a wife could sue her husband for a debt or obtain a judgment against him in her own name upon any sort of a contract. In *Ritter vs. Ritter*, 7 Casey, 396, the Supreme Court held, that such action is not authorized by the act of 1848, or any of its supplements. It is

clear, therefore, that such an action cannot be maintained. A summons is adverse process, and public policy has from time immemorial been held to forbid such process. The same considerations of policy which forbid the wife to bring and prosecute an action against her husband, should certainly forbid her to pursue her husband with a *fi. fa.*—seize and sell his personal property, and sweep its proceeds in her pocket. To permit all this would tend, to say the least, as strongly to disturb the domestic relations, as to permit the issuing of a summons. But an objection of equal gravity is, that it would open the door to fraud. The wife would have an advantage over all other creditors, if she and her husband were acting in concert, which would enable her to keep her husband's creditors constantly at bay. For both reasons it cannot be permitted. The Supreme Court seem to treat this as beyond question in *Williams' Appeal*, supra, and the counsel for both appellant and appellee, in that case, discussed the questions involved upon that basis. For these reasons the exceptions are overruled and the report confirmed.

Court of Common Pleas of Venango County.

[Leg. Int., Vol. 30, p. 13.]

YOUNG et al. vs. ALLEGHENY OIL COMPANY. CHARLES W. CAMBLOS, PRESIDENT; ALLEN B. MILLER, TREASURER; M. EINSTEIN, SECRETARY, et al., DIRECTORS OF SAID COMPANY.

In a bill in equity, filed under the act of assembly of 18th July, 1863 (relating to mining companies), to recover from the *officers* and *directors* of the company, the debts due by the latter, neither the *company* nor the *secretary* should be joined as a defendant. A bill brought under said act will not be dismissed for multifariousness because it embraces, as grounds for its support, two separate debts due to two separate plaintiffs. The bill must state that the sheriff *made demand* on the executions issued against the company, and *when* he made it.

If two judgment creditors join as plaintiffs in the bill, it is not sufficient to charge that the corporation did not exhibit sufficient estate to satisfy *both* writs of execution against it. If there was enough property to satisfy *one* writ, the officer should have sold it.

Query? Whether a bill should be dismissed because it does not aver that *no portion* of the judgment against the company (the foundation of the bill) has been paid.

In equity. The bill charges that plaintiffs are creditors of the defendant company.

That the corporation was duly organized under the act of assembly, approved the 18th day of July, 1863, entitled, "An act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," and the several acts supplementary thereto.

That the principal office of said corporation is situate in the city of Philadelphia, and the operations of said corporation were carried on in the county of Venango.

That from the 1st day of August to the 21st day of December, 1865, the said corporation became indebted to the said Young in the sum of one thousand dollars, and that from the 16th day of May, 1865, to the 18th day of January, 1866, said corporation became indebted to Dunn & Kinnear (plaintiffs) in the sum of two hundred and sixty-four dollars and eighty-eight cents.

That Young recovered judgment for the above-mentioned sum on the 11th day of June, 1867; and that the said Dunn & Kinnear recovered a judgment for the sum due them; that executions, by writs of *fiery facias* were duly issued; and that the said corporation did neglect, for the space of thirty days after demand made by the sheriff, on said executions, to pay the several amounts due on said judgments as aforesaid, and to exhibit to the officer having charge of said writs real or personal estate of said corporation subject to be taken in execution sufficient to satisfy said writs, and that the said executions were returned unsatisfied, and that the said judgments still remain unsatisfied.

That the said president, treasurer, secretary and directors have, as such, neglected to sign the certificate required by the provisions of the 33d section of the act of the general assembly aforesaid.

That the said president, treasurer, secretary and directors of said corporation neglected to file a copy of the certificate required by the provisions of the 31st section of the said act of assembly.

PRAYERS.—*Inter alia*, that the said officers may be compelled jointly and severally to pay to your orators and all other creditors of said corporation the several judgments and sums of money due them respectively.

The defendants demurred, and assigned for cause the following:

1. That the oil and coal company is improperly made a party to said bill.
2. That M. Einstein, styled secretary of said company, in said bill, is improperly made a party thereto.
3. The bill is multifarious in this, that it embraces, and the complainants seek to recover by it, two separate debts due by the said company to two separate sets of plaintiffs, and upon three separate grounds.
4. The bill does not state when demand was made by the sheriff of Venango county, on the executions referred to in said bill; or, except impliedly, that any demand was made.
5. The bill does not state that the said company did neglect for the space of thirty days after demand made, to exhibit to the officers having charge of said execution real or personal estate of said company, subject to be taken in execution sufficient to satisfy *either* of said writs of execution, but only that there was insufficient estate to satisfy both of them.
6. The bill does not state that no portion of either of the judgments referred to in said bill has been paid.

Opinion delivered by

TRUNKY, J.—The corporation should not be joined with the officers liable for its debts and contracts. The bill may be filed against it and the stockholders, or against the officers: Act of July 18, 1863, section 42, Legal Intelligencer, vol. 25, p. 45.

2. M. Einstein is called secretary of the company. He is not charged to have been a director, nor president, nor treasurer. The act does not make it the duty of the secretary to make and file the certificates referred to in the 10th and 11th paragraphs of the bill. Einstein is improperly joined as a defendant.

3. The bill may be filed by the judgment creditors or any other creditor in behalf of himself and all other creditors of the corporation: Act

of July 18, 1863, section 42. It is a bill for all the creditors, and cannot be dismissed by the creditor commencing the action without order of the court: Section 46. We think it would be better for one creditor alone to bring the suit as plaintiff in behalf of himself and all the creditors. This would be within the letter of the act, and would not in the first instance require so much matter to be set forth in the bill in reference to the claims. The action is for the benefit of all the creditors. Two of the creditors, with distinct claims, are partly plaintiffs. The others not named are interested. Is not the bill within the spirit of the act? As a rule the bill is multifarious when the plaintiffs seek to recover separate debts, each debt owing to an individual plaintiff. There are some exceptions. In *Brinkerhoff et al. vs. Brown*, 6 Johns. C. R. 139, it was held that "different judgment creditors may unite in any bill against their common debtor; an object of all of them being the same; for the aid of the court to enforce their liens at law." Other exceptions are stated in Story's Eq. Pl., § 279a, 285, 285a, 286 and 286a. The reasoning of the chancellor in *Brinkerhoff vs. Brown*, applied to this bill, relieves it from objection; for here there is no particular matter of litigation peculiar to each plaintiff; their rights are established by judgment against the corporation; the plaintiffs as well as all the other creditors may be said to have a joint interest in the subject of dispute, the *gravamen* of which is the charge that the defendants are liable to all the debts by reason of certain acts on their part as officers of the corporation. The bill so charges as to show all the acts by some officers, and that they and the others are liable as officers to be charged with payment of the debts. In view of the remedy as prescribed, we think the bill should not be dismissed on the ground that it is multifarious.

4. The bill ought to state that a demand was made, and when made.

5. When two judgment creditors join as plaintiffs, they should set forth explicitly in reference to each judgment and execution all the specifications necessary under the act. It is not sufficient to charge that the corporation did not exhibit sufficient estate to satisfy *both* writs. If there was enough to satisfy one writ, the officer should have sold it, and thus one of the claims would have been disposed of.

6. We will not at present say that a bill will be dismissed if it does not aver that no portion of the judgment has been paid. Certainly it would be well to state if any part has been paid, and, if any, how much.

The demurrer on the grounds stated in the 1st, 2d, 4th and 5th assignments is sustained. The plaintiff having asked leave to amend the bill, the prayer will be granted on terms.

McCalmont & Osborn, and *Blakeley & Miller*, Esqs., solicitors for plaintiff.

Samuel Plumer and *W. C. Rheem*, Esqs., of Venango county, *Isaac S. Sharp* and *H. P. Alleman*, Esqs., of Philadelphia, solicitors for defendants.

Court of Common Pleas of Wyoming County.

[Leg. Int., Vol. 30, p. 21.]

CAMP AND WIFE vs. STARK.

1. An instrument in writing executed by a married woman as a will, in the presence of but two persons, one of whom is a devisee, of an estate in remainder under the will, cannot be established as a valid will under the act of 1848.
2. The proviso to that act which requires that the will of a married woman shall be executed in the presence of two witnesses, is to be construed as a condition, without compliance with which the will is invalid.
3. A devisee is a party to the will, and not a witness, within the meaning of the statute. The witnesses must be competent at the time of execution of the will to authenticate it by their testimony.
4. The act of 1863 allowing parties to be witnesses is not retrospective in its character, to the extent of making a party to a will executed in 1858, a witness within the meaning of the proviso of the seventh section of the married woman's act.
5. It is not necessary to the validity of the will of a married woman that she should in all cases make the formal declaration that it is her last will.
6. An issue directed by the register or register's court to the Common Pleas can only be for the trial of disputed facts. Whether an instrument upon its face is a testamentary disposition is a question of law, which must be determined by the register or register's court, or by an appeal to the Supreme Court.

Copy of the Will in controversy.

February the 28 1858

the request of tresse Carey i want ransler Carey to hav my plase as long as he shall liv i want drusila Carey two stay and keep house for hur father and martin i want mr carey to give lovica shoop won shawl wone pare of stockins Rosaner clark wane coverlid i want cathern stapten to hav my cloak and two Dreses i want mr carey to give won hundred dollars two the methodus Church i want drusilla carey to have all my hous hold property as soon as i am ded and after mr carey is ded i want drusila carey two have my farm.

Terisse X carey.

Opinion delivered November 18, 1872, by

ELWELL, P. J.—On the trial of this cause the questions chiefly discussed by the counsel and presented for the consideration of the court and jury, were, whether the instrument alleged to be the will of Terressa Carey, was a testamentary document, and whether it was executed, as testified by Carolina Dickerson and Drucilla Camp. The court was not requested to charge the jury that the execution of the paper in the presence of Mrs. Dickerson and Drucilla Camp, the latter being a devisee under the will, was not a valid execution under the statute, but as it was given in charge, that “if the jury believed the testimony of those witnesses it was a valid will—a legal testamentary document”—I have considered it the duty of the court to examine the correctness of that ruling, and to grant or refuse a new trial, according to my convictions as to whether it was erroneous or correct.

Upon a precept from the register's court a feigned issue was made between the parties to try the validity of an instrument in writing alleged to be the will of Terressa Carey. On the trial the evidence showed, that Terressa Carey, on the 28th of February, 1856 or 1858, she

being at the time a married woman, directed Mrs. Caroline Dickerson to write down her wishes and desires in regard to the disposition of her property at her death; that the instrument in question was written in her presence and in the presence of Drucilla Camp, then Drucilla Carey, a daughter of the husband of the alleged testatrix, and a devisee under the will; that the paper was read over by Mrs. Dickerson to Mrs. Carey, and after being corrected in some particulars, was declared by her to be "right;" that she then executed the paper by making her mark at the end thereof, in the presence of the two persons named, her husband out of the house at the time; that the instrument was taken possession of and kept by Mrs. Dickerson until after the death of Ransalaer Carey, the husband of Mrs. Terressa Carey, in 1871, when it was presented for probate. Delilah Custard, a girl about ten years old, was in and out of the room, and heard, as she testified, some of the directions given by Mrs. Carey, as to what she wanted done with her property; she did not remember whether Mrs. Carey signed the paper or not.

Mrs. Carey died on the next day after the date of the paper. These are substantially the facts as shown by the testimony on the part of the plaintiffs. Evidence was given by the defendant tending to impeach the witnesses of the plaintiffs, but it is not necessary now to repeat it.

The jury was instructed that if the testimony of Caroline Dickerson and Drucilla Camp was believed, the instrument in question was duly executed, and their verdict should be for the plaintiffs. The correctness of this instruction is now the question for our consideration.

Power to dispose of property by will was conferred upon married women by the seventh section of the act of assembly usually called the "married woman's act," passed April 11, 1848, in these words: "Any married woman may dispose, by her last will and testament, of her separate property, real, personal, or mixed, whether the same accrues to her before or during coverture. *Provided*, That said last will and testament be executed in the presence of two or more witnesses, neither of which shall be her husband."

On giving construction to this act, Woodward, J., in delivering the opinion of the court in *Fransen's Will*, 2 Casey, 205, says: "To execute a will is to complete it as a legal instrument, to perform every act which is requisite to give it validity. To execute it according to the above proviso is to sign it or request another to sign it in the presence of two or more witnesses, and to publish and declare it in their presence to be the last will and testament of the party whose signature has been placed to it; nothing less than this can be execution of a will by a married woman."

Admitting this to be the correct rule in general, I do not think the latter part of it can be applicable to a case where the paper is drawn in the presence of the testatrix, written or dictated by her, read to her, and signed in the presence of the witnesses. When a paper is drawn and signed for the purpose of disposing of property after the death of the party signing it, I cannot think it necessary that there shall be a formal declaration that it is the last will and testament of such party. The fact of requesting the paper to be drawn, and the signing of it with knowledge of its contents, and all these in the presence of the witnesses, is a sufficient publication to answer the requirements of the law. The state-

ment of the law by Knox, J., in the same case, concurred in by Lewis, C. J., is, in my opinion, nearer to the true intent and meaning of the act, than that of Judge Woodward. He says: "The witnesses mentioned in the section should be present when the will is completed by the signature of the testatrix, and they should see her signature put to the will, or receive her acknowledgment of its genuine character at the time of the execution thereof." Were there two witnesses present at the execution of the will of Terressa Carey, within the meaning of the statute? In other words, was Drucilla Carey, now Drucilla Camp, who was a devisee under the will, such a witness? If she was, no error was committed in the charge; if she was not, the instructions to the jury were incorrect, unless the act of 1869, which provides, that "parties to issues *deviseavit vel non* shall not be excluded from being witnesses, respecting the rights of the deceased owner where the issue is between parties claiming such rights by devolution on the death of such owner," have the effect to make a witness not only at the trial, but also at the time of execution of the will.

The act of 1848 requires more than is required by the act of 1833. The latter permits wills to be proved by the testimony of two witnesses, who need not be subscribing witnesses, nor present at the execution of the will. But the former requires that the will shall be *executed* in the presence of two or more witnesses. The difference between the requirements of these statutes was undoubtedly occasioned by a desire on the part of the Legislature to protect married women who are thereby authorized to dispose of their property by will, from fraud, coercion, or undue influence, by the presence of persons at the very moment of the execution of the will, competent to testify as witnesses. If this had not been so, the requirement would have been, that the act of executing be done in the presence of two or more persons, neither of whom should be the husband. But by requiring that the persons present should be "witnesses," it is clearly implied that they shall be competent to confirm the authenticity of the act by their testimony.

The *proviso* in the act cited creates a *condition*. In the first part of the act, power is given to married women to dispose of property by will, "provided," or upon *condition* that such will is executed in the presence of two witnesses, neither of whom shall be the husband. If this condition is not complied with, the instrument is invalid for want of power to dispose of the property by will in any other manner than that pointed out by the statute. In *Forscht vs. Green*, 3 P. F. Smith, 140, it was said by Thompson, C. J., that the word "provided" "generally creates a condition." Such is the undoubted meaning in the statute of 1848. A proviso in an act authorizing a railroad company to enter upon and use land, that the road should purchase the land or pay damages to be assessed as therein described, was held to be a condition precedent, and that an action of trespass might be maintained for an entry before the damages were paid: *Bloodgood vs. The Mohawk & Hudson Railroad Company*, 18 Wend. 9.

The *presence* of witnesses at the execution of the will of a married woman is as necessary to its validity as that it should be signed at the end thereof. No one will contend that an unsigned instrument can have effect as a will.

That a witness to answer the requirements of the statute must have been *at the time* a competent witness, is a position sustained both by reason and authority. In *Miller et al. vs. Carothers et al.*, 6 S. & R. 222, in which it was proposed to prove the handwriting of a subscribing witness to a will, he being a devisee of part of the land in dispute, it was *held* that the evidence was not admissible, for, said Tilghman, C. J., "He was a devisee in the will and interested from the beginning. He was, therefore, never what our act of assembly called a *credible witness*. He was never a *competent witness* under the circumstances; he is to be considered as if he had never been a subscribing witness, and it would have been improper to prove his handwriting."

In *Harding vs. Harding*, 6 Harris, 342, this case is cited and approved, and the same doctrine again held.

In *Hawes vs. Humphrey*, 9 Pick. 350, it was held in accordance with the reasoning of Lord Camden in *Doe vs. Kerecy*, 1 Day, 41 (in note), that the provisions and policy of the statute require that the testator should be guarded from imposition by the presence of witnesses free from objection at the time of attestation: 2 Greenl. Ev., sec. 691 and note. In the case of *Haus vs. Palmer*, 9 Harris, 296, an attempt was made to maintain a nuncupative will by the testimony of a devisee who had assigned all interest in the estates; but it was *held* that the devisee was not a competent witness, and as the law to be followed by the court below in the further progress of the cause, it was further held, that the will was of *no validity* unless there were two disinterested persons present at the making of it, who were *then* competent as witnesses. Judge Lowrie says, page 299, "The evidence of a verbal will is part of its very essence. The law makes it so, when it requires that some person present shall be called upon by the testator to bear witness that such is his will, and that two of them must prove it. *When the law requires persons to bear witness, it means that they shall be competent as witnesses. We make it speak nonsense, if we make it mean that the parties shall bear witness*, a phraseology which, even in common parlance, is not free from absurdity. It is of great importance that there should be disinterested persons present at the making of such wills, and the law intended to provide for this." The substance of this ruling is, that a witness incompetent at the making of the will cannot be considered as a witness within the meaning of the statute, by a subsequent assignment or release of all claim under the will.

The execution of a will must be judged of by the law as it stood at the time of its execution: *Mullen vs. McKelvy*, 5 Watts, 400.

It is argued by counsel for the plaintiff, that all the law requires is, that the witnesses shall be competent when they come to the book, and if they prove the presence of two persons at the execution of the will and the other requisites to a valid execution, that the requirements of the law are satisfied. As we have already seen, this view of the law is not supported by the authorities.

The act of 15th of April, 1869, provides that "no intent or policy of the law shall exclude a party or person from being a witness in any civil proceeding." But it may be questioned whether devisees of married women and legatees under nuncupative wills are thereby made

competent to establish a will, under which they hold, by their own testimony. Although they are not to be excluded as witnesses "in issues and inquiries *devisavit vel non* and others, respecting the rights of such deceased owner, between parties claiming such right by devolution on the death of such owner." I am not satisfied that there was any intention on the part of the law-making power to change the statutory laws which require the presence of *disinterested* witnesses at the execution of wills by married women. The temptation to fraud and perjury would be very great if such were the law. It would be simply alarming, if it were held, that a will, executed by a mark could be sustained by the testimony of two legatees, or one legatee and another person. But however that may be, since the passage of the law of 1869, the law is unchanged as to cases which had arisen before that time.

If an instrument has not the effect of a will at the time of its execution and the death of the testator, no subsequent legislation can make it a valid will, and divert the descended estate: *Greenough vs. Greenough*, 1 Jones, 494; *Dule vs. Medcalf*, 9 Barr, 108; *Norman vs. Heist*, 5 W. & S. 171; *Bolton vs. Johns*, 5 Barr, 145; *Shinkle vs. Creek*, 5 Harris, 159; *McCurly vs. Hoffman*, 11 Harris, 508; *Aller's Appeal*, 17 P. F. Smith, 345.

There is nothing in the act of 1869 which indicates any intention to give it a retrospective operation, thereby attempting to make valid instruments affecting the title to property which were before invalid in law. In the absence of express words requiring it, courts uniformly construe statutes as being prospective in their operations. We give to the act its full force by permitting Mrs. Camp to be a witness on the trial. But did her testimony, with that of Mrs. Dickerson, prove the due execution of this will? She proved that *she* was present, but we have shown that her presence did not count one in the number of witnesses; that she was a *party*, and not a witness at that time. It follows that although she is a witness now, she fails to show that she was a witness then. There was error, therefore, in the charge as to the effect of her testimony, for which a new trial must be granted.

Issues are directed under the act of 1832, upon the proper precept from the register or register's court, when matters of fact are alleged touching the validity of any testamentary writing. But whether the instrument is of a testamentary character or not, in my judgment, must be determined by the register or register's court, on appeal, or by the Supreme Court on appeal from the register's court. An issue of law is not to be sent to the Common Pleas upon questions which properly belong to the tribunal which has exclusive jurisdiction upon matters of probate. The issue *devisavit vel non* involves the validity of the execution of a will and not its contents: *Patterson vs. Patterson*, 6 S. & R. 55.

But I have no doubt in regard to the instrument in question here being of a testamentary character. It appears from the writing itself, that it was the desire and wish of testatrix that her property on her death should go to and be held by the persons therein named as the objects of her bounty. It is evident from the document itself, that it was intended to take effect at the death of the testatrix. It has, therefore, every essential element of a testamentary disposition of property,

either real or personal: 1 Williams on Executors, 74, and cases cited; 8 Am. Law Reg. (new series) 704.

Finding nothing which we are convinced was erroneous in the charge, so far as relates to the alleged will, we would not disturb the verdict were it not for the express instructions that the testimony of Mrs. Dickerson and Mrs. Camp, if believed, proved the due execution of the will; but deeming this to have been error, a new trial must be granted.

Rule made absolute.

R. R. Little and P. M. Osterhout, Esqs., for rule.

E. Smith and M. Piatt, Esqs., opposed.

[*Leg. Int., Vol. 30, p. 361.*]

RACE vs. SNYDER.

1. At common law the owner of cattle was liable for injury done by them, as in the eye of the law every man's land was set apart by enclosures from that of his neighbors.
2. This was universally held to be the law in the northern counties until the case of *Gregg vs. Gregg*, 5 P. F. Smith, 227. That case construed the acts of assembly to change the common law.
3. If the owner of improved land has no fence enclosing his crops, he cannot recover for injury done to them by roving cattle.
4. The construction given to the statutes relating to fences. (Opinion of Judge Addison approved and in part adopted.)
5. A fence should be such as farmers of practical knowledge and experience would consider as sufficient to protect crops from injury by orderly cattle. With such sufficient fence an action may be sustained, although not made of logs, or rails, or posts and boards, and not "four and one-half feet high and well-staked and ridered."

Trespass for damage done by cattle to growing crops. Sufficiency of fence passed upon.

Charge of the court delivered by

ELWELL, P. J.—The plaintiff in this action seeks to recover damages for injury alleged to have been done by the cattle of the defendant to his crops of growing corn in the summer of 1870. It appears by the undisputed evidence that these parties were owners of adjoining land in Northmoreland township. The land of the plaintiff was cleared and cultivated; that of the defendant was in woods, which were enclosed by fences erected for the enclosing of surrounding fields. Between the defendant's woods and the plaintiff's field of corn, on the line between them, a fence consisting of logs, rails, brush and stone, was erected by the plaintiff and those under whom he claimed. In June, 1870, this fence being considerably out of repair, the young cattle of the defendant, as is alleged, broke into the plaintiff's field in which corn had been planted. Upon complaint being made by the plaintiff to the defendant, he told the plaintiff to repair the fence, and gave permission to cut trees upon his side of the line and therewith repair the fence. It is alleged by the plaintiff that he did repair the fence, by lapping trees upon it and by erecting a stone wall, and thereby made it a good and sufficient fence; but that the defendant's cattle being breachy continued to break into his corn-field and destroy or injure his crop of corn. The principal matters in controversy are the sufficiency of the fence and the amount of damages done by the defendant's cattle. It is a maxim of the law that every man must so use and take care of his own as not to injure his neighbors.

At the common law under this rule, the owner of cattle which went upon the cultivated land of another was liable for injury done by them, although the land was not fenced; every man's land being in the eye of the law enclosed and set apart from that of his neighbor.

In these northern counties this rule of the common law was universally understood to be the law of the State until the decision of the Supreme Court in the case of *Gregg vs. Gregg*, 5 P. F. Smith, 227. In that case the acts of assembly were construed to change the common law upon the subject.

It was held, and must now be considered as the law, that if the owner of improved land has no fences enclosing his crops he cannot recover for injuries done thereto by reason of cattle straying upon his land. He must fence his land both to retain his own cattle and to shut out the roving cattle of his neighbors. If he is negligent in the performance of this duty, he contributes to the damage which as a consequence ensues, and can sustain no action therefor.

It is contended by the counsel for the defendant that the plaintiff was guilty of negligence, and is not entitled to recover, if you find from the evidence that his fence was not four and a-half feet high. I do not concur in this view of the law. The point decided in *Gregg vs. Gregg* does not go that length.

In construing the statutes upon this subject, it was held by Judge Addison, three-fourths of a century ago, that if a fence, though what was not called *lawful*, be what is called *neighborly*, and sufficient to keep out cattle *not breachy*, that trespass will lie for injury by the cattle of another. This view of the law has not been rejected as unsound in any case of which I have knowledge, in which the question was distinctly raised. I adopt it as substantially correct, and instruct you that if the defendant's cattle broke through or jumped over the fence between the plaintiff's corn-field and the defendant's woods, and damaged the plaintiff's corn, he is entitled to recover for the damage done, *unless you are satisfied from the evidence that the fence was not such as farmers of practical knowledge and experience would consider as sufficient to protect the crop from injury by usually orderly cattle*. If it was *such* a sufficient fence, for the damage done while in that condition the plaintiff may recover, although it was not made of logs or rails, or posts and boards, and was not "four and a-half feet high and well-staked and ridered." On the contrary, if not sufficient, judged by the standard before mentioned, no recovery can be had for the injury done while in that condition.

The facts of the case are to be ascertained by and are entirely submitted for your determination under the evidence. In deciding as to the sufficiency of the plaintiff's fence, you will consider the material of which it was made, as well as its height, breadth and firmness, and you will give to the opinion of witnesses upon the subject such weight as you think they are entitled to. If, under the facts as you shall find them, and the law as we have laid it down, the plaintiff shall in your judgment be entitled to recover, your verdict shall be in such amount as will compensate him for the damage sustained.

Court of Common Pleas of Bucks County.

[Leg. Int., Vol. 31, p. 333.]

HUDNIT vs. ROBERTS.

Where materials are furnished, not under a contract for the whole, for two buildings which are the proper subject of an unapportioned lien, the claims for the materials for the building first erected must be filed within six months from the time the last materials for it were furnished. The subsequent furnishing of materials for the other building will not extend the time for the filing of the lien for the materials furnished for the first building.

Mechanics' lien—exceptions to auditor's report.

Opinion delivered *December 24, 1873*, by

WATSON, A. L. J.—The defendants were engaged in business as drovers. They owned a lot of land in Newtown township. In the spring of 1868 they commenced the erection of buildings upon this lot. They designed to "build a barn, wagon-house and shed, and to fix up generally for all kinds of stock."

The barn and wagon-house were connected together so as to form one building. It was begun in April and completed in September, 1868.

The shed was begun in February, 1869, and was completed in a few days. It was an open shed about eighty feet long by eighteen feet wide, divided into stalls for stabling mules, and was about twenty feet distant from the barn.

The lumber for both these buildings was furnished by Stacy Brown & Co. That for the barn and wagon-house was first contracted for, and it was furnished as the building progressed, the last charge being on the 12th of August, 1868. Some time afterwards an account for it was rendered to the defendants, and they made partial payment upon it.

Soon after the commencement of this building, one of the defendants communicated to Stacy Brown & Co. their design to build the shed and to fix up generally for all kinds of stock, but no contract was then made or order given for the lumber for the shed. The lumber for it was bought in February, 1869, and was all furnished on the 9th of that month. On the 13th of March, 1869, Thomas B. Scott obtained a judgment in this court against the defendants for \$5,000.

On the 7th of June, 1869, Stacy Brown & Co. filed a joint or unapportioned lien against both buildings for the amount of their claim for lumber furnished by them for their erection.

The property was afterwards sold on the execution of another creditor, and the fund in court for distribution is the proceeds of sale remaining after the payment of undisputed liens. It is claimed by Scott upon his judgment, and by Stacy Brown & Co. upon their lien.

It was decided in *Lauman's Appeal*, 8 Barr, 473, that when a mechanics' lien is filed against several farm buildings intended to be used and occupied together, there is no necessity for its apportionment among the several buildings. Being all erected for a common purpose, and subject to the same use and occupancy, the reasons for apportionment do not exist; and the act of 1836, directing such apportionment, does not apply. If this was the only difficulty in the case it would be easy of

solution. The auditor has gone farther, and held that when such buildings, in pursuance of an original design of the owner, are erected at different times, and the materials are furnished for all of them, not under one contract or under a general engagement for the whole, but under separate contracts for each, the lien, if filed within six months after the materials are furnished for the last building, will relate back to the beginning of the first and bind the whole for the full amount furnished for the several erections. He has, in pursuance of this ruling, applied the whole balance of the fund to the payment of the mechanics' lien in preference to the judgment entered after the commencement of the first building.

It was held in *Yearsley vs. Flanigan*, 10 Har. 489, decided in 1854, that when a contract is made to do all the brick and stone work of a building, the contract being entire, a lien may be filed within six months from the laying of the pavement, although all except the pavement was completed more than six months before. Yet if the building be finished and the contract treated as if completed, and a considerable period of time suffered to elapse before the pavement is laid, and other rights have intervened, the lien will be too late.

The act of 14th April, 1855, P. L. 238, provided "whenever the items of a mechanic's or material man's bill for work done or material furnished *continuously* towards the erection of any new building, are in any part *bona fide* within six months before the filing of the claim therefor, the lien shall be valid for the whole." Before the passage of this act, it had been held that the lien could not be sustained for materials furnished more than six months before its filing, unless furnished under a contract or engagement for the whole: *Phillips vs. Duncan*, 3 Am. Law Reg. 304. The purpose of the act of 1855, as is said by Judge Agnew, in *Singerly vs. Doerr*, 12 P. F. S. 13, was "when the materials were in part furnished for a single building, to the same contractor, in the ordinary progress of the work upon it, thus giving to them a unity of purpose, if not of contract, to correct that apparent want of continuity which *Phillips vs. Duncan* had decided to exist when there was no contract or order for the whole bill." Again, the same judge says in *Diller vs. Burger*, 18 P. F. S. 432, "the act of 1855 applies to work done or materials furnished continuously to the same building, and was intended to link together the items of an account for work or materials where there was no contract for the whole, or no order which would embrace the whole in a single transaction." To sustain the lien in the present case, it is necessary to go a step farther, and to hold that the items of an account for the materials furnished for the erection of different buildings, which are the subject of a joint or unapportioned lien, may be linked together so that the claims for materials furnished within six months for the one last erected, will carry with it and sustain the lien against all, for materials furnished for the erection of the others more than six months before the filing of the claim, and which other buildings, though forming but a part of the original design of contemplated improvements, were in fact completed as independent structures, before the last one was commenced.

It may be admitted that these buildings are properly the subject of a joint lien, but it does not follow that each of them is not also the sub-

ject of a separate lien. The barn and wagon-house were connected together so as to constitute one building. The mule shed afterwards erected was not connected with it, and although in the same enclosure, and designed to be used in the same business, was a complete building of itself. The materials for the first were all furnished and the building was finished before the materials were furnished or bought for the second, and before its erection was commenced.

Although the intention or design of the Messrs. Roberts to put up the shed was made known to the claimants soon after the barn was begun, yet that intention or design had not then taken shape, and it might be abandoned altogether. In fact nothing was done towards carrying it out until nearly five months had elapsed after the completion of the other building. There was nothing to prevent the claimants from filing their lien against the barn for the material furnished for it, and until the commencement of the shed there was nothing to give notice to other parties—purchasers or creditors—that the improvements were not complete, or that anything more was to be done, by which the time for filing a lien would be extended.

The rulings in the last two cases cited show that the act of 1855 is only intended to extend the time for the filing of the lien against a single building, and the fair inference is, that it will not avail to sustain a claim for materials furnished separately for several buildings, each of which is the subject of a separate lien.

We think it was incumbent on the claimants to file their lien against the barn and wagon-house constituting the first building within six months from the time when the last materials were furnished for it, and that having failed to do so, their lien for such materials is gone.

As to the claim for materials furnished the mule shed, the lien is sustained.

The report is recommitted to the auditor with instructions to report a schedule of distribution in accordance with this opinion.

[Leg. Int., Vol. 31, p. 349.]

JAMES LOVETT vs. NANCY LOVETT.

Lapsed devise—Executory devise—Limitation over after successive contingencies—Dower in lands after a fee determined.

1. A lapsed legacy or devise usually falls into the residue and goes to the residuary legatee or devisee. If there be no residuary legatee or devisee, or if the lapse be of a part of the residue itself, then it passes as intestate property to the next of kin or heirs of the testator.
2. An executory devise may be limited to take effect after several intervening estates, either vested or contingent, if the final contingency upon which it is to vest be not too remote; that is, it must happen, if at all, within a life or lives in being and a competent time afterwards.
3. The widow of a tenant in fee which fee is determined by the death of the tenant without issue, is entitled to dower in the estate thus determined.

Case stated in ejectment. Opinion delivered by

WATSON, P. J.—This case arises under the will of John H. Lovett, deceased.

The evident design of the testator was to leave his estate to his two sons, Jefferson and Herman, in such a way as to secure them "a regular and certain means of support," but not to fetter the estate further than

was considered necessary to effect this purpose. The provisions of the will, as to the care of the property and the power of the trustees over it, are extended and minute. They need not be particularly stated here. They show the intention above stated, and authorize the trustees to execute the trust by an absolute conveyance of the property to the sons, whenever the propriety of such a conveyance should be manifested in the manner pointed out by the will. Then follows the clause under which the questions in this case arise. It is as follows: "If, however, the contingency thus provided for should never happen, and the trusts herein created should remain unexecuted in my said sons, my will then is, that if my said sons, Jefferson and Herman, shall die leaving lawful issue surviving them, then I give and devise one-half of the real estate which shall then remain unsold to the lawful issue of Jefferson in fee simple, and the other moiety of the said real estate to the lawful issue of Herman, also in fee simple. And I give and bequeath all the personal estate then remaining in the hands of my said trustees or their successors, to the said lawful issue of my said sons; the said personal estate to be divided into two equal shares, and one moiety to be paid to the issue of Jefferson, and the other moiety to the issue of Herman; the issue of a deceased child to take the same share as their parent would have done if living; and if either of my sons, Jefferson or Herman, should die leaving no issue living at the time of his decease, then I devise the said real and personal estate to the survivor in fee. And if both my said sons, Jefferson and Herman, should die leaving no issue living at the time of their decease, then I devise and bequeath the said real estate in fee and the personal property absolutely to Mercy Lovett and James Lovett, the children of my brother Owen, share and share alike, their heirs and assigns forever."

Then follows a devise of his burial lots in the cemetery to his two sons, and directions to his executors to place stones at his grave.

The previous bequest and devise to the trustees is of "all my personal estate of whatsoever kind and all my real estate wheresoever situated." There is no disposition of any *residue* of estate, as such, in the will.

Mercy Lovett, one of the devisees in remainder, died unmarried and without issue in the lifetime of the testator.

After the death of the testator, the trustees named in his will administered the trust during the lifetime of the sons. The discretion vested in them to convey the real estate to the sons was never executed.

Jefferson died after his father, unmarried and without issue, leaving his brother Herman surviving him.

Afterwards, Herman also died, leaving no issue, but leaving a widow Nancy, to whom, by his will in writing, since his death duly proved, he devised his whole estate absolutely. The land devised by the will of John H. Lovett, or so much of it as is involved in this case, was in the possession of Herman at the time of his death, and since then has been and still is in the possession of his widow under his will.

This suit is brought by James Lovett, the devisee in remainder under the will of John H. Lovett, against Nancy Lovett, the widow and devisee of Herman, for the land thus in her possession.

Let us first consider the effect of the death of Mercy Lovett, in the lifetime of John H. Lovett, the testator. The devise to her and James

was to take effect upon the happening of the contingency of both Jefferson and Herman dying without leaving issue living at the time of their death, and it was to them, "share and share alike, their assigns forever." As John H. Lovett left lineal descendants, the devise to Mercy, the daughter of his brother, does not fall within the saving power of the act 6th May, 1844, P. L. 565. The limitation to her heirs and assigns was intended to define the estate she was to take, and not to provide for the substitution, as devisees, of such persons as might answer that description in the event of her death in the lifetime of the testator: *Dickinson vs. Purvis*, 8 S. & R. 71.

It therefore lapsed. To whom did it go ?

Usually a lapsed legacy or devise falls into the residue of the estate, and passes with it to the residuary legatee or devisee if there be one. The reason of this rule is, that the residuary clause is intended to embrace everything not before effectually disposed of. When this intent is negatived the rule does not apply. Thus, in the case of a *residuary* bequest or devise to several as tenants in common, the share of one dying in the lifetime of the testator does not pass to the others, because the testator has specified the proportion each was to take. Here the lapsed share, if real estate, will go to the testator's heirs; if personal property, it will go to his next of kin, as intestate property: *Williams on Executors*, 1459, note (vi.); *Cambridge vs. Rous*, 8 Ves. 25; *Craighead vs. Given*, 10 S. & R. 351; *Woolmer's Estate*, 3 Wh. 477.

Where there is no residuary clause a lapsed legacy goes to the next of kin: *Armstrong vs. Moran*, 1 Brad. Sur. R. 314.

When a legacy is given to two persons jointly, and one of them dies before the testator, the whole will survive to the other: *Morley vs. Bird*, 3 Ves. 628. When given to legatees as tenants in common, as where an aggregate fund is to be divided among them in equal shares, if any of them die before the testator, what was intended for those so dying will lapse into the residue.

Where a legacy is given to a *class* of persons in terms as tenants in common, as to the children of A., the death of one of them, in the lifetime of the testator, will not occasion a lapse of any part of the fund, but the whole will go to the survivors of the class: *Williams on Executors*, 1462, and cases cited.

Here the devise to Mercy and James Lovett is to them individually and not as a class; it is to them in equal shares; it is to them as tenants in common and not jointly. The whole, therefore, does not survive to James. The intention of the testator was to dispose of his whole estate. All except his burial lots was embraced in his provisions for his sons, and in the contingent limitations over in the event of their dying without issue living at the time of their death. There was no residuary devise into which the lapsed share of Mercy could sink. It follows that this share was undisposed of by the will, and upon the death of testator descended as intestate property to his heirs, being his two sons, Jefferson and Herman. Upon the death of Jefferson his interest in it descended to his surviving brother, and upon the death of Herman the whole of it passed under his will to his wife Nancy.

This disposes of the questions here involved as to the undivided one-half of the land in dispute in favor of the defendant.

We come now to consider the claim of the plaintiff to the other undivided half.

The trusts in the will were to continue during the lifetime of the sons, unless sooner executed by conveyance to them in the exercise of the discretion vested in the trustees. If the trusts should not be executed by such conveyance (and they were not) then upon the death of the sons leaving lawful issue surviving them, the property was to go over to their issue, one-half to the issue of each in fee simple. If either should die leaving no issue living at the time of his decease, then the whole was to go to the survivor in fee. If both should die leaving no issue living at the time of their decease, then the property was to pass to James Lovett, the plaintiff, and his sister, in equal shares.

This will was made since the passage of the act 27th April, 1855, P. L. 368, by which all estates tail created thereafter are converted into estates in fee simple. We therefore need not stop to inquire what was the character of the fee devised to the sons, nor need we consider whether the estate originally vested in them was a fee in both or a life estate in each with cross remainders in fee. The result, for the purposes of this case, is the same, let the original estates have been what they may. By the terms of the will the fee in the whole, upon the death of Jefferson without issue or wife, became vested in Herman, subject only to be defeated, if it might be defeated at all, by the happening of the further contingency, to wit, his dying also without issue living at the time of his death, and which contingency afterwards actually occurred.

We have thus an estate in fee in Herman, subject (as to one-half) to a limitation over to James in fee upon the death of Herman without issue living at the time of his death. An executory devise is a limitation by will of a future estate or interest in land which cannot consistently with the rules of law take effect as a remainder. It is not derived out of, or dependent upon, the estate which it supersedes. It is a future, substantive, independent limitation, to arise on a given event, and the circumstance that that event involves the failure of a preceding estate is merely accidental. As where the deviser parts with his whole fee simple, but upon some contingency qualifies that disposition and limits an estate upon that contingency: 1 Jarman on Wills, *778, *791; Fearn on Remainders, 399.

Whether the fee upon which the limitation is grafted be immediate or one in remainder, either contingent or vested, can make no difference, so that the contingency must necessarily happen, if ever, within one or more lives in being and twenty-one years after, including a sufficient number of months for the birth of a child *in ventre sa mere*: Fearn on Remainders, 431; 3 Green. Cruise, 456; Smith on Executory Interests, § 706; *Leavitt vs. Logan*, 3 Wal., Jr., 184; *Thellusson vs. Woodford*, 4 Ves. 227; *Wells vs. Ritter*, 3 Wh. 226; *Smith vs. Townsend*, 8 C. 441.

The time here, within which the interest of the plaintiff must vest, if it ever vests, is fixed, to wit, at the death of the survivor of the two sons of the testator, both of whom were in being when the will was made and took effect, and it was not objectionable by reason of its remoteness. The limitation to him falls strictly within the definition of an executory devise. The contingency for its vesting has arisen and the estate which before was contingent has become vested in him.

One question yet remains to be considered—the claim of the widow of Herman Lovett to dower in the land thus devised to the plaintiff.

By the law of England a wife is entitled to dower and a husband to curtesy in an estate tail in lands determined: 1 Coke Lit. 30a., 81b., 241, note 170; Paine's Case, 8 Rep. 34. An immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, etc., the devisee having the inheritance in fee subject only to a possibility: 1 Jarman on Wills, *792; *Buckworth vs. Thirkell*, 1 Col. lect. Jurid. 332; and the same in Virginia: *Talliferro vs. Burwell*, 4 Call, 321.

In this State it has been expressly decided that a widow is dowerable of a fee simple determined by executory devise on her husband dying without issue living at the time of his death: *Evans vs. Evans*, 9 Barr, 190; *Buchanan vs. Sheffer*, 2 Y. 374. See also two interesting papers on the subject of dower in qualified fees in 2 Southern Law Review, 447, 615.

The claim of the wife to dower in the share devised to the plaintiff is not inconsistent with her claim to the whole, or in opposition to the will of her husband. Under his will she would take all in fee; under the statute she will take as dower only the half during life.

We thus sum up our examination of the case.

1. The devise to Mercy Lovett lapsed by her death in the lifetime of the testator. The contingent interest in the land devised to her, passed as intestate property to the testator's heirs, his sons Jefferson and Herman. Upon the death of Jefferson his share therein descended to his brother Herman. This contingent interest united in Herman with his previous estate, and vested the one undivided half of the land in him absolutely, and this half is now vested in his wife under his will.

2. Under the will of the testator, the plaintiff took a contingent interest to the extent of one undivided half of the land by way of executory devise. This contingent interest has become absolute by the happening of the contingency upon which it was to vest, to wit, the death of both of the previous devisees without leaving issue living at the time of their death.

3. The plaintiff takes this share subject to the statutory dower of the defendant therein, being the one-half thereof during her life.

4. The plaintiff is entitled to judgment that he recover possession of the one undivided fourth part of the lands for which this suit was brought, and that he recover his costs in this behalf expended, which judgment we direct to be entered.

[Leg. Int., Vol. 31, p. 358.]

BENSALEM SCHOOL DISTRICT vs. BILBROUGH & JACKSON.

A joint action against three. Award against two and in favor of the third. Appeal by the two. No appeal as to the third. Subsequent proceedings against the two. On the trial the signature of third defendant admitted to be forged. *Held*, that the record might be treated as amended and a verdict against the two sustained.

Amendment—pleading.

Opinion delivered *October 30, 1874*, by

WATSON, A. L. J.—This action was brought against three defendants. A declaration was filed against all on their joint bond. Arbitration before plea. Award in favor of the plaintiff against two and no cause of action as to the third. Appeal by the two defendants against whom the award was rendered. No appeal by the plaintiff. Subsequent proceedings against the two only, one of whom pleaded "*non est factum*" and "*nil debet*," and the other pleaded "performance." On the trial the jury was sworn as to the two. Evidence was given to prove the execution of the bond by them, and it was admitted on both sides that the signature purporting to be that of the third defendant was a forgery. The jury rendered a verdict in favor of the plaintiff, subject to the opinion of the court upon the following points reserved:

1. "Can the plaintiff recover without proof of the execution of the bond by George Jackson, the third defendant?"

2. "Can the plaintiff sustain this action, issue not having been joined as to the said George Jackson, and an award of arbitrators in his favor unappealed from having been made by arbitrators in this case?"

A motion has been made to enter judgment for the defendants *non obstante veredicto*, and the question embraced in these points are now for our consideration.

No formal amendment of the record by striking out the name of the third defendant, George Jackson, has been made or asked for. Unless the award in his favor is to be considered as an amendment, we are clearly of opinion that the verdict cannot be sustained: 1 *Chitty's Pleading*, 44, a; *Loew vs. Stocker*, 11 P. F. S. 347; *Cook vs. Mackrell*, 20 P. F. S. 12.

Various acts of assembly have been passed to authorize amendments to actions improperly brought, or brought by or against improper parties. The act of 12th April, 1858, authorizes the striking out of the names of plaintiffs or defendants, if too many have been included by mistake, so as to secure a trial of the cause upon its merits. These acts have been liberally construed by the courts, that they might fully answer the purposes for which they were intended. Many cases under them might be cited, some of which even go so far as to allow amendments to be made after the case has reached the Supreme Court. In *Loew vs. Stocker*, an amendment, by striking out the name of a defendant, was asked for and allowed after verdict. The Supreme Court held this to be erroneous, because being made after verdict, it was not then necessary in order to secure a trial of the case upon its merits. If an amendment had been applied for in the present case, it would undoubtedly have been allowed.

We, however, regard the acquiescence of the plaintiff in the award of the arbitrators in favor of the third defendant, whose name to the bond is admitted to be a forgery, and his being dropped from the subsequent proceedings, as equivalent to an amendment. The cause proceeded against the others in the same manner as if a formal amendment had been made by striking out his name whenever it occurred. The jury was sworn as to them alone; the verdict was rendered as to them alone. They had notice that the claim had been abandoned against their co-defendant, and were deprived of no defence which they might have set up if the formal amendment had been made, except, indeed, the technical one which is now urged.

We therefore decide the reserved points in favor of the plaintiff; overrule the motion of the defendants, and direct judgment to be entered against them on the verdict.

Court of Common Pleas of Columbia County.

[Leg. Int., Vol. 31, p. 334.]

THE LOCUST MOUNTAIN COAL AND IRON CO. *vs.* JOHN CURRAN *et al.*

In a proceeding by bill in equity to restrain the collection of school taxes, the court will not inquire into the validity of the appointment of the collector, he having given bond with sureties approved as required by law.

The act of May 8, 1854, did not establish a fixed rate of taxation for school purposes. It merely provided a standard, by which the MAXIMUM rate could be ascertained at the time the tax is levied; to wit, the amount of both State and county taxes, authorized by law.

The act of February 23, 1866, exempting real estate from the three mill tax for State purposes, operated as a reduction of a like amount on that species of property for school purposes.

A levy of thirteen mills on real estate is three mills in excess of what the law allows. The collection of such excess may be restrained by injunction.

In equity. Motion for a preliminary injunction. Opinion delivered September 29, 1874, by

ELWELL, P. J.—The plaintiffs' bill alleges that Martin Purcell, being one of the school directors of Conyngham township, was appointed collector of the school taxes, and also, that the school directors of that district have levied a tax of thirteen mills on the dollar of the adjusted valuation of their real estate which the defendants are proceeding to collect. It is complained that Martin Purcell was improperly appointed collector, and that the tax above ten mills on a dollar is illegal. It appears by the answer of the defendants, that Martin Purcell, being one of the school directors, was duly elected treasurer of the board, and that no person offering to take the office of collector, he was appointed thereto, and gave bonds approved as required by law for the due performance of the duties of the respective offices. The plaintiff now moves for a preliminary injunction to restrain the collection of any part of said tax by Martin Purcell as collector, and to prevent the collection of three mills, first of said tax, by the hand of any person.

The first ground upon which the injunction is asked is untenable. The collector is at all events an officer *de facto*, the validity of whose appointment cannot be inquired into in this collateral proceeding. And if it could, we would not put forth the strong arm of the law to

stay the collection of school taxes, unless we were satisfied that irreparable loss would be sustained by the tax-payers and the district, unless we did. Nothing of the kind is alleged, and for that reason alone, we would refuse the injunction to restrain the collection of the tax generally. In another case, No. 296 September Term, 1874, a *quo warranto* against Martin Purcell, to show by what authority he exercises the duties of the office of collector of school taxes of Conyngham school district, in an opinion just filed, we held for reasons given, that he was duly appointed to the office and gave judgment in his favor. That judgment is *conclusive* of his right while it stands unreversed upon the record.

But the directors went beyond their authority when they levied a tax of more than ten mills on the last adjusted valuation of the real estate in their district. At the time of levying this tax, the rate per cent. for county taxes was limited by law to ten mills on a dollar. Taxation is regulated wholly by statutes. Both the subjects for taxation, and the amount of tax authorized can be ascertained only by reference to acts of assembly. In order that school directors might be provided with a ready and convenient guide, both as to subjects of taxation, their values and the amount of tax which they are authorized to levy, the Legislature passed the act of May 8, 1854, the 29th section of which requires the commissioners of the county to furnish them with a correct copy of the last adjusted valuation of proper subjects, and things made taxable for State or county purposes, which subjects and things are made taxable for school purposes. Having thus ascertained the objects of taxation, the next section regulates the amount of tax thereon. Not by any specified rate per cent., but by a maximum, to be ascertained by reference to other laws upon the subject. The 30th section of the act provides, that "the board of directors shall, on or before the first Monday in June, *annually*, proceed to levy and apportion the said school tax, pursuant to this act, not exceeding the amount of State and county taxes authorized by law to be assessed on all objects, persons and property, made or to be made taxable for State or county purposes."

The amount is not to exceed that authorized by law for State and county purposes. Authorized when? at the time of passing the act or at the time of levying the tax? If the former was intended, the law makers could scarcely have omitted the word "now" and thus establish a fixed rule not to be varied by subsequent legislation in regard to State or county tax. I submit that the amount of tax which could be levied was to be ascertained by the standard furnished by the act of 1854, which was and is the amount authorized by law *at the time of levying the tax*, and not at the date of the enactment.

The act of April 8, 1846, forbids the granting of injunctions by the courts against the erection of any public works "erected or in progress" under the authority of an act of the Legislature, until the questions of title and damages were decided, *held* that the "works erected or in progress" referred to, were not limited to the date of the enactment, but that the law applied to the time when resort was had to a court of equity: *Wolbert vs. The City of Philadelphia*, 12 Wright, 439. The rules of construction there applied are applicable to the act of 1854. The directors are required annually to levy a tax, and the law in

force at the time, as to the amount, is the authority under which they act.

In 1854 the law imposed a tax of three mills on a dollar of the valuation of real estate for State purposes, and ten mills for county purposes. But on the 23d of February, 1866, P. L. 83, an act was passed exempting real estate from all taxation for State purposes. From that time to the present the amount authorized by law to be levied upon real estate for either State or county purposes or both is limited to ten mills on a dollar of the valuation.

I am unable to concur in the views expressed by the superintendent of common schools on this subject. He declares it to have been the "obvious intention of the law to fix the amount of tax at thirteen mills on the dollar, and thus avoid the perplexing changes that would otherwise cripple the financial managements of school affairs:" School Decisions, 1873, page 74. With all due respect to the opinion of the superintendent, I am compelled to differ with him, and to hold, that the manifest and plain intent of the act was to allow to be imposed each year for school purposes, as much as the law allowed for both State and county purposes.

I hold, too, that if the Legislature should add to the list of things made taxable some things not taxable for State or county purposes in 1854, such subjects would at once become taxable for school purposes. And if the rate per cent. were increased from what it was in 1854 for State purposes the increase for school purposes according to the express language of the act might be equal to the amount thus increased. If this be so, and it is too clear to be doubted, it follows with equal reason, that when subjects of taxation are reduced in number, or the tax made less for State and county purposes, the amount of school tax undergoes a like reduction.

Since the act of 1866, the amount of tax on real estate is limited by law to ten mills on a dollar for State and county purposes—there being no State tax and the limit for county tax being that amount. In adopting thirteen mills as the rate per cent. in taxing real estate the school directors exceeded their authority, and to the extent of that excess, may be enjoined: *Shirk vs. Bucher*, 3 P. F. Smith, 94.

In *Gorrell vs. Murphy*, 1 Legal Gaz. Rep. 495, we refused to enjoin the collector, holding that although irregularly assessed, the tax levied in that case was not illegal. In the argument we went further than was necessary, but the point decided was not in conflict with what we now hold.

And now, September 29, 1874, the motion for a preliminary injunction came on to be heard and was argued by counsel, and upon due consideration thereof it is ordered that a preliminary injunction be issued to restrain the defendants from the collection of more than ten mills on the dollar of the last adjusted valuation of the real estate of the plaintiff in Conyngham township. Before the writ goes out the plaintiff is required to give bond in the sum of three hundred dollars as required by law, with surety to be approved.

Court of Common Pleas of Crawford County

[Leg. Int., Vol. 31, p. 254.]

THE CHARTER OF RED MEN'S MUTUAL RELIEF ASSOCIATION OF
WESTERN PENNSYLVANIA.

On granting charters of incorporation. Opinion delivered by
LOWRIE, P. J.—This document has been presented to me for approval, with the proof that the public notice required by law has been given, and I have perused and examined it, and find that it is not in proper form.

1. The document to be presented for examination is called, in the act of 29th April, 1874, relating to incorporation, "the charter of the intended corporation," and also, "the certificate of incorporation;" but, in this document, it is called *by-laws*, which word is used in the act of assembly, as it is in common parlance, in a very different, and even a contrasted sense. And this error leads to a fundamental error in the last article, which unlawfully assumes and ordains that the association may, by its own act, alter its *charter*, miscalled its *by-laws*.

2. It neglects several directions plainly set forth in section 3 of the act of assembly; in not stating the term of the corporation, nor the names and residences of the subscribers (or members), nor the number of its directors, nor the names and residences of those chosen for the first year; though it seems there must be at least nine who are to be residents of Titusville, and it may possibly be *inferred*, though it ought not to be left to inference, that these nine are what is called the "Local Board."

Associations of this kind, usually called *beneficial*, do not consist of stock subscribers, and I suppose it is so with this one; and hence it cannot give "the number of shares subscribed by each," as required by law; and this duty may be sufficiently complied with by the statement made of the contributions which each member is bound to pay into the common fund.

In requiring the names and residences of the present directors, the law plainly indicates that the application for incorporation is to be made by an existing association already organized, presenting its constitution for legal approval. That constitution must of course be in conformity, both in principle and form, with the act of assembly, and when legally approved and recorded, it becomes the charter of incorporation of the association. It is not intended that any persons who choose may seek such a charter, and that then whosoever will, may organize themselves into an association, and become incorporated under it. And then the public notice of the intended application for a charter, becomes a notice to all the members of the association, and not merely a notice to all strangers who may choose to intervene in the matter.

3. The law requires that the charter shall be subscribed by five or more persons (meaning members, of course), and acknowledged by at least three of them, and this is not done.

If persons, in preparing such papers, would carefully compare their work with the act of assembly, they would save themselves from much trouble and unpleasant disappointment.

The proposed charter is not approved.

Mr. Blackmarr, for petition.

[Leg. Int., Vol. 31, p. 245.]

SAMUEL VAN SYCKLE vs. GEORGE S. AND MILTON STEWART.

Legal arbitration act of April 6, 1870, for Erie, Elk, Crawford and Lawrence counties
—Interpretation of the law—Distress for rent, replevin, reference to legal arbitration, form of award.

1. The act of April 6, 1870, must be so construed as to give it practical effect, and not to embarrass a reasonable administration of it, by sustaining critical exceptions on account of form, or time or manner of filing papers, notes of testimony and memoranda of proceedings.
2. When a legal arbitrator fails to file all the papers of a case, the proper remedy is to apply to the court to have such defects supplied, and if necessary, for an enlargement of the time for filing proper exceptions. When this course is not pursued, an exception that all the papers were not filed will be sustained, particularly when all are on file before and at the time of hearing.
3. The law provides two modes of correcting errors in proceedings under it: First, by motion to set aside the award: Second, by filing exceptions to the rulings and decisions of law.
4. An exception that the legal arbitrator did not duly reflect upon the case, being insusceptible of proof, will be dismissed.
5. It is no ground for exception that the body of the award of the arbitrator is not written by himself, but by another hand.
6. If a party alleges "failure of mental vigor" in the arbitrator, during the trial, he must apply to be relieved from the submission for that reason. After electing to take his chance, and an award against him, he cannot except on this ground.
7. It is not "misbehavior" on the part of an arbitrator to use printed notes of testimony, not shown to be incorrect, furnished by one party, the other refusing to contribute to the expense of preparing them.
8. An exception that a party used "undue influence" upon the arbitrator, without specification of the act or acts, and not proved, will be dismissed.
9. Counsel have a right to withdraw points of law submitted to the arbitrator for his opinion in writing, before the award is made. It is unusual for one party to except because the points of the other are not answered. Such exceptions, if made, will be disregarded unless accompanied by specifications of some error in them, or the rulings or decisions of the arbitrator about them.
10. An exception to the award of a legal arbitrator that it is "illegal in substance and form, and without law or evidence to support it," is merely an assignment of "general errors," and is of no value without proper specifications.
11. Where in replevin for goods distrained for rent, the pleas are *non demiserunt et riens en arriere*, and they are sought to be sustained by evidence of fraud in obtaining a lease, a finding of facts by the arbitrator that the relation of landlord and tenant existed between the plaintiff and defendant by virtue of a lease of a certain date in writing; that there is a sum certain due the defendants for rent under the lease; that no fraud is proved, with a statement of distress, replevin and pleadings showing the issue, is sufficient under the section requiring a finding of facts in the nature of a special verdict.

Sur exceptions to award. Opinion delivered February 16, 1874, by LOWRIE, P. J.—We may not admire the law of the 6th of April, 1870, providing for what the Legislature says shall be called "legal arbitrations," as distinguished from our old acquaintances, *compulsory and voluntary arbitrations*, which it says shall hereafter be called by the strange name of "lay arbitrations;" that is, in Erie, Elk, Crawford and Lawrence counties, where the law and this new language are to be used. But we must not allow any prejudice against it, if we have any, to in-

duce us to exercise any authority over it so as to embarrass a reasonable administration of it. It is a form of legal remedy intended to be practical, and we must not in the exercise of our duty of review and superintendence of the work done under it, be so critical and exacting about its forms, as to frighten away its use by rendering it unmanageable and odious, as we should do if we were to heed the countless objections, which may be easily raised in the application of a new form tending more to obstruct its operation or foil its effects, than to secure its proper use as a juridical remedy.

This we might do if we were to set aside awards under it, because some of the papers of the case, notes of testimony, rulings on questions of evidence, or on points of law, have not been filed, or were not filed in time, either by accident, carelessness or design. The proper remedy for such matter is by application to the court to have such defect supplied, and to obtain from the court, if necessary, an enlargement of the time given for filing the proper exceptions.

The law, section 5, provides two modes of correcting errors in the proceedings, to wit, by "motion to set aside the award," and by "filing exceptions to the rulings and decisions of law therein."

The plaintiff has adopted both of these, and we proceed to consider them separately.

The law, section 10, allows such an award to be set aside "for such misbehavior on the part of the arbitrator as in the opinion of the court shall invalidate the award," and also "for testimony discovered after the trial, such as will justify the court in granting a new trial."

No newly-discovered testimony is alleged, and therefore we consider now only the exceptions which may be supposed to relate to the misbehavior of the arbitrator. None of them are so presented as to indicate that they are intended to be classed under either of the modes above specified. All the exceptions are mixed together, and we are left to separate them as well as we can, into exceptions, for one or the other purpose.

Exceptions one and four are for omissions to file a memorandum of his proceedings, rulings and decisions, and we have already sufficiently indicated the proper answer to these; and besides all these papers are on file so far as we are informed, and were filed very soon after the award, and long before this hearing, and there are more than enough of them to satisfy any reasonable desire of devising and filing exceptions.

The second exception, in substance, calls upon us to say that the arbitrator did not duly reflect on the case, and assigns as a proof of this that he lost an important paper of the plaintiff before making up his award. But we cannot call this misbehavior, even if truly assigned, and we never can know how much he had reflected on the case during the thirty odd days of the hearing, and the intervals thereof, and the twenty-one months spent in its entire consideration.

Exception sixth is, that the award is not written by the arbitrator, but by another hand. How this can be made misbehavior we cannot conceive, and we say no more about it.

Exception seven is, that there was great failure of mental vigor in the arbitrator between the commencement and the conclusion of the proceedings. It is a sufficient answer to this, that this is not misbehavior,

and the parties did not apply to be relieved from their submission on this account, but chose to take their chances and to object only in case of an unfavorable award.

Exception nine is, that the defendants had all the notes of trial printed for the use of themselves and the arbitrator, and would not furnish copies to the plaintiff. This the defendants answer that the plaintiff refused to contribute to the cost of them, and they certainly did differ about this. (The contest seems to have been not amicably conducted.) But there is no evidence that the printed copy is untrue, or that it was improperly used. We suppose he might have used printed paper books without being suspected of misbehavior.

Exception ten charges that one of the defendants made use of undue influence on the arbitrator, but no act of this kind is either specified or proved.

Perhaps some of the exceptions hitherto discussed were not intended to be put in the class of "misbehavior," but we know not where else to place them; they certainly do not belong to the only class left.

We come now to the other mode of correcting errors in this sort of proceeding, to wit: by filing "exceptions to the rulings and decisions of the law therein."

One of the exceptions of this class may be the fifth; that the defendants filed a list of points of law and requested the arbitrator's decisions thereon, which were not given, and that the defendant's counsel afterward *abstracted* them. Perhaps they *withdrew* them before the award was made, as they had a right to do, and as, indeed, they ought to have done, for they are little else than the steps of the counsel's argument. And it is not usual for a plaintiff to except that the defendant's points are not answered. If they were important to the plaintiff, and this were shown, the court might require them to be filed for his use. They are now here, thirty-eight in number, and the plaintiff might have used them to ground any exceptions upon that he pleased for our review. He excepts to nothing in them, nor to any rulings or decisions of the arbitrator about them.

Exception eleven is, that the award is illegal in form and substance, and without law of evidence to support it; and this is manifestly of no value, for it specifies no error of any kind in law or fact, and is therefore no better than an assignment of "general errors."

Exception eight is more particular, and specifies the parts of the award to which it objects; but if it is not a mere criticism of the logical or illogical order of thought expressed in the award (which is not admirable), then it means that the arbitrator erred in finding that the defendant's rent is due to them and awarding them the amount thereof; it may mean that such is not a proper award in replevin on a distress for rent, and so it was argued. But in this respect the award is clearly right as appears from many cases: 4 Yeates, 264; 5 S. & R. 132; 10 Id. 92, 202.

Exception three is, that the award does not contain the facts of the case in the form of a special verdict as required by the statute.

In considering this exception we have to inquire into the meaning of the term *special verdict* as used in the statute. It is manifestly not a special verdict in the usual sense of that term: for that consists of the

relevant facts of the case specially stated, leaving to the court the application of the law to the facts and the entry of the proper judgment thereon. But the award "in the form of a special verdict" provided for here, is in some sense special and at the same time general; for, besides "reporting the facts of the case," it must be such that a judgment *nisi* may be entered thereon on the filing thereof, that is, by the prothonotary in the usual way of awards, subject to being set aside or changed by the court on the hearing of well-founded exceptions thereto.

The general part of the award is without any faults, for it finds that the plaintiff is indebted to the defendants for the rent claimed, amounting with interest to the date of the award, to the sum of \$2,548.99.

The special part reporting the facts is also, we think, sufficiently, though not skilfully, stated; for we find in it with the aid of the pleadings, to which it refers, that the plaintiff was lessee of the defendants by a written lease, dated April 11, 1870, of real property, and at a rent therein specified and stated, and for the rent thereon due, \$2,188.20, the defendants distrained the goods of the plaintiff found on the premises, and thereupon the plaintiff replevied the said goods and filed a declaration, in answer to which the defendants avowed for the said rent in arrear, and the plaintiff replied thereto, first *non demiserunt*, and second that the said lease was obtained from him by fraud (*prout* pleadings filed); that after full hearing, he finds no sufficient evidence of the fraud, and that on all the law and evidence the defendants are entitled to recover their said rent, which means that the defendants' avowry is true and the replication not true.

And the question rises, do these facts, so specifically reported, authorize the general award above stated in favor of the defendants? We cannot doubt that it does: 2 Yeates, 543. We must therefore dismiss these exceptions and enter the judgment that is proper in a replevin by a lessee against his lessor or his bailiff on a distress for rent, and a verdict in favor of the lessor for the rent due. See the cases heretofore cited from our own reports. It would be different where the goods distrained are the property of a person not himself liable for the rent, or liable only for a part of it: 13 Serg. & R. 178.

And now, to wit, February 16, 1874, the exceptions to the proceedings and award of the arbitrator are dismissed, and the award confirmed, and it is considered and adjudged by the court that the defendants have a return of the goods and chattels taken on the replevin, and that they recover against the plaintiff the sum of \$2,548.99 for their rent and damages, as of the day of filing the award, November 7, 1873, and interest thereon since that day, together with double costs.

Messrs. *Johnson* and *Harris*, for plaintiff.

Messrs. *Sherman*, *Guthrie* and *Derickson*, for defendants.

Court of Common Pleas of Cumberland County.

[Leg. Int., Vol. 31, p. 117.]

S. AND G. HAUCK vs. GEORGE SINGLE.

Covenant based on a deed of conveyance of land, containing a general warranty.

Per curiam. Opinion delivered by

JUNKIN, P. J.—The following facts are found by a jury as a special verdict:

That the defendant by deed dated 16th of May, 1870, conveyed in fee simple to the plaintiffs one hundred and forty-four acres of land in Silver Spring township, Cumberland county, Pa., with general warranty. That seventy-three acres, fifty-three perches of this were unpatented, and it cost plaintiffs \$77 to pay off the claim of the Commonwealth and procure the patent, which plaintiffs did on the 13th of April, 1872. That the deeds for this land, up to 1790, contained a clause exempting the vendors from paying or being liable for the unpaid purchase-money due the Commonwealth; but that no deeds after 1799 are upon record, and that these up to 1799 were not delivered to the plaintiffs, nor were they in the possession of the vendor, when he sold to plaintiffs; nor, I take it, were the recorded deeds ever actually seen by the plaintiffs before accepting the vendor's deed, 16th of May, 1870, so that the vendees are unaffected with actual notice of the claim of the Commonwealth, or that purchase-money was due the latter, and thus the case is stripped of that knowledge which justifies the inference that the vendees took the risk of the title in this particular upon themselves.

Then we have the simple question, can a vendee who has paid his purchase-money, and taken no other covenant than a general warranty in usual form, and the State enforces payment of the original purchase-money, and the vendee pays to *prevent* eviction, sustain covenant on the warranty? Common sense would decide this in favor of the vendee, and all the ordinary instincts of justice would approve the award. Yet all the ancient authority on the abstract proposition is against such right.

But has this very question been considered as it now comes before us? We think not, and we believe a departure from the mere technicalities of the ancient doctrine, that without actual eviction, a general warranty is not broken, is a necessity to prevent what would dishonor the law, a failure of justice.

Patton vs. McFarlane, 3 Penna. Reports, 419, is accepted as settling, that while forcible eviction is not required to breach the warranty, still there must be an actual *surrender* to the superior title. Undoubtedly the authorities sustain this position. When, however, Judge Kennedy comes to discuss the Commonwealth's claim for purchase-money, as he does on page 425, he uses this language: "Although the Commonwealth had a claim against the land, she had taken no steps whatever, after the conveyance of it to McFarlane, to *enforce* the payment of the money. When she would have done so, was uncertain; and Patton had a right under his covenant of warranty with McFarlane, to avail himself of all the indulgence that might be given by delay on

the part of the Commonwealth to proceed against the land, etc. Although it may be considered certain that the payment of the money would have been compelled some day or the other, yet it might make some difference to Patton whether he was to be called upon immediately at the will of McFarlane for payment, or to have it postponed to a distant day, by forbearance on the part of the Commonwealth to proceed to collect it."

It is nearly certain that the judgment in this case rested on the want of eviction or ouster. Yet McFarlane was treated as a volunteer, paying that which was not demanded, and probably never might be. But since the acts of 20th of May, 1864, 4th of April, 1868, and 11th of April, 1872, Brightly's Purdon, pages 919 and 920, the Commonwealth is filing its liens in every county and demanding payment, and has directed its authorities to enforce collections of the purchase-money due her on lands. She is not driven to an action of ejectment; she has judgment; there can be no successful resistance; the owner of the land is virtually evicted unless he pays. Under such circumstances he does not pay voluntarily. Admitting the rule as laid down in *Paul vs. Witman*, 3 W. & S. 407; *Clark vs. McAnulty*, 3 S. & R. 364; *Stewart vs. West*, 2 Harris, 336; *Dobbins vs. Brown*, 2 Jones, 75; *Wilson vs. Cochran*, 10 Wright, 229; *Knepper vs. Kurtz*, 8 Smith, 480; and *Scott vs. Scott*, 20 Smith, 244, to be, that there must be actual or constructive eviction by title paramount, the case before us is *sui generis* in this, that the sovereign sets up this title paramount and demands its purchase. It is against its policy to put the occupant out of possession.

But what is *constructive* eviction or dispossession? Mr. Rawle, in his excellent work on Covenants for Title, page 212, says it is: "1st. Where the covenantee never had any actual possession, etc. 2d. Where after the establishment of the adverse title by judgment, the covenantee accepts a lease or other conveyance under it and remains in possession; and 3d. Where he does so even although no judgment has established the adverse title." In our case we have judgment, paramount title, and its conveyance by patent to the vendees. Is not this constructive eviction? We thus bring the case within our own State decisions. Mr. Rawle supports his three propositions by many cases: *Clark vs. McAnulty*, 3 S. & R.; *Hamilton vs. Cutts*, 4 Mass. 349. Then on page 242, he says: "But however far the doctrine of constructive eviction may be supposed to have been carried, it is believed to be still absolutely necessary that the adverse claim shall have been hostilely asserted. It is not necessary that the assertion should be made by a judgment, or even a suit, any more than it is necessary that an eviction, when actual, should be under legal process."

This claim of the Commonwealth goes to the root of the title, the owner of the warrant has but an equity: *Gregg vs. Patterson*, 9 W. & S. 197. It would sell out the equity as absolutely as the superior title in any other case overthrows the inferior and takes possession. When the plaintiffs purchased the patent how was the vendor injured? He was benefited by the prompt payment of the State's demand. And how the vendor's rescue from great loss should furnish the reason for not paying the small cost of his salvation, is hard to understand.

The custom of the people to accept these warranties as their security

against just such claims is universal, and it will produce consternation if it is held that the ounce of prevention cannot be applied, and that the pound of cure is, in law, best after all. Our Pennsylvania system, which is broadbreasted and straightforward, says to a vendee, who still retains purchase-money, and alleges a defect in title or incumbrance, the risk or payment of which he has not assumed, that he may refuse payment until he gets what he bargained for, covenants or none, warranty or none. He may purchase an outstanding title or incumbrance, and set off its cost against what he owes. All this is reasonable and readily understood, prevents circuity of action and leads to repose.

But when it is said that no action can be maintained on a general warranty in a conveyance, unless there is actual eviction averred and proved, that the vendee in possession must actually move out, surrender up the possession to the paramount title, then, if he choose, buy such ousting title and move in again, the reason is not perceived, nor the mind much impressed with the wisdom of the procedure. If we read the covenant itself, it binds the grantor to defend against all persons whomsoever, lawfully claiming or to claim.

The Commonwealth lawfully claimed and was about to evict the plaintiffs, which they seeing bought her out. There is no collusion; none was possible. In equity that is considered done which ought to have been done. Why not here consider that as done, which could and would have been done, had the plaintiffs not paid, and thus made the paramount title their own?

In *Loomis vs. Bedel*, 11 New Hamp. 74, Parker, C. J., said: "It seems to be generally settled that in order to support an action upon a covenant of warranty there must be something more than evidence of an outstanding paramount title. There must be an assertion of that title, and an ouster or disturbance by means of it; but no technical eviction by judgment at law is necessary, nor is any resistance of the paramount title, legal or otherwise, required to a maintenance of an action upon the covenant. It is well settled that an entry under the paramount title amounts to a breach of a covenant of warranty; and the grantee, upon demand, may surrender the land to a claimant having a good title, and resort to his action: 4 Mass. Rep. 349, *Hamilton vs. Cutts*. But in *Waldron vs. McCarty*, 3 Johnson's Rep. 471, where there was an outstanding mortgage at the time of the conveyance to the plaintiff, and the premises were afterwards sold upon the mortgage, in pursuance of a decree of the Court of Chancery, and purchased by the plaintiff, who then brought his action upon the covenant of warranty in his deed, the court held that an entry and expulsion were necessary, and that there was no sufficient eviction or disturbance of the possession. In our opinion this is carrying the principle too far. If the claimant holding the paramount title should enter upon the land, and the grantee should thereupon yield up the possession, he would immediately have a right of action upon the covenant of warranty in the deed; and this right would not be barred or forfeited should he forthwith purchase the premises from the claimant, to whose superior title he had thus yielded the possession. He might, on such purchase, immediately re-enter into the possession, and still maintain his action of covenant. If, instead of this formality, he yields to the claims of a paramount title, and purchases

without any actual entry of the claimant under it, where is the substantial difference? For all practical purposes, his title under the grant to which the covenant is attached, and under which he originally entered, is as much defeated in the one case as in the other. He is in fact dispossessed so far as that title is concerned; he is still in possession, but he is so under another title, adverse and paramount to his former one; and his purchase is therefore equivalent to an entry of the claimant. It is an ouster by his consent, and a re-entry by himself under the superior title, without going through what would be at best a mere formality, where, conscious of the defect of the title under which he originally entered, he chooses to yield peaceably to the assertion of a better title and to purchase it."

He then goes on to show that the grantor is not injured by this course, and that he could not be benefited by the vendee going out and then going in again.

In *Brown vs. Dickerson*, 12 Penna. State Rep. 372, our own Supreme Court approve of C. J. Parker's views, and condemn *Waldron vs. McCarty*; and Mr. Rawle, in his work on *Covenants for Title*, cites both, and concludes on page 243, thus: "According, therefore, to the weight of authority at the present day, the distinction is not whether there has or has not been a judgment in favor of the paramount claim, but whether such claim has or has not been adversely asserted." We have shown for three or four years last past, the Commonwealth has asserted her paramount title, filed her liens and threatened eviction, and that her title cannot be resisted.

The plaintiffs did in this case, what we believe they had a right to do, purchased the superior disturbing title, and benefited not only themselves, but the defendants also, and are now entitled to recover.

Court of Common Pleas of Dauphin County.

[Leg. Int., Vol. 31, p. 245.]

THE COMMONWEALTH OF PENNSYLVANIA *ex rel.* SAMUEL E. DIMMICK, ATTORNEY-GENERAL, *vs.* THE HOCK AGE MUTUAL BENEFICIAL ASSOCIATION OF PHILADELPHIA.

Every insurance company of this Commonwealth is required to file with the insurance commissioner a certified copy of its charter, together with a certificate, stating the time of its organization, the location of its principal place of business, and the names and residences of its officers, as directed by the 8th section of the act of 4th April, 1873.

Every insurance company is compelled to transmit to the commissioner a statement of its condition and business, as directed by the 12th section of that act, except those specially exempted by section 16 of same act, who must at all times answer such interrogatories as the commissioner may require to ascertain their character and condition.

No company incorporated within this Commonwealth since the adoption in 1857 of the fourth amendment to the constitution, can claim immunity from filing such certificate and making such statement, on the ground that said act violates the Constitution of the United States by impairing the obligation of contracts, although there may have been no provision in the charter reserving to the Legislature "the power to alter, revoke or annul it."

Opinion delivered *July*, 1874, by

PEARSON, P. J.—On the 4th day of April, 1872, the defendant was incorporated by an act of assembly. On the 4th day of April, 1873, a

statute was enacted "to establish an insurance department;" pursuant to which an insurance commissioner was duly appointed. Complaint was made to the attorney-general by the insurance commissioner, that this corporation had neglected and refused to file in his office a certified copy of its charter, time of its organization, location of its place of business, names and residences of its officers, and a statement of its condition, business, etc., and asking that the concern might be closed. This was duly brought before us pursuant to the act of assembly, and it is agreed that the court shall find the facts so far as they are disputed. An answer has been filed by the defendant, to which there is a replication to matters more of form than substance.

The 8th section of the act of April 4, 1873, requires every insurance company of the State to file with the commissioner a certified copy of its charter, together with a certificate stating the time of its organization, the location of its principal place of business, and the names and residences of its officers. This, it is conceded by the answer, has not been done. The excuse given in the answer, and urged on the argument, is that the charter is a contract between the company and the State, and that consequently the latter has no power to add to its terms or force additional burdens on the respondent. That it cannot be called on to furnish a copy of its charter, but did refer the insurance commissioner to the page in the statute book, in which he would find it printed. It is not pretended that the time of the company's organization, the place of its insurance or business location, or the names of its officers, was set forth or reported in any way, although we now have papers attached to the answer, from which the location might be inferred, as they are dated at Philadelphia. It is not averred that such papers were sent to the commissioner. The whole assumption of this corporation, as to its charter being a contract by which it is exempt from legislative control and above immunity to change, is fallacious. It took its charter under the 26th section of the first article of the State Constitution as amended in 1857, which declares "that the Legislature shall have power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any general or special law, whenever in their opinion it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators." These and similar expressions have received judicial construction. In *Sherman vs. Smith*, 1 Black, 593, it was decided by the Supreme Court of the United States, that where a law creating or authorizing banks to organize under a statute, reserved to the Legislature the power to alter or repeal the act, it by necessary construction reserved the power to alter any one of the terms and conditions or rules of liability prescribed in the act, and therefore a law making the stockholders individually liable for the debts, does not impair the contract between the State and stockholders. We may fairly infer that if the Legislature has the power to repeal the whole charter, it may well be said to possess that of comparatively small modifications. The major includes the minor. In 1 Paige's Ch. R., page 102, it is held that where a power to alter, amend or repeal a charter is reserved in a law, it may be exercised by the Legislature, and it will be presumed where the charter is repealed that it was for sufficient cause.

In *The Iron City Bank vs. Pittsburgh*, 1 Wright, 340, we have a case arising under a different clause of the Constitution, but in substantially the same words. The bank had a provision in its charter exempting it from taxation except for State purposes, yet it was held that a subsequent general law imposing a tax for city purposes on all of the banks therein, embraced this bank, and was a lawful exercise of power.

The Commonwealth vs. Fayette County Railroad, 5 P. F. Smith, 452, arose under an act of assembly which incorporated the company, with a clause that it should not be taxed until the dividends amounted to six per cent. per annum. Long before any dividends were made, the State by a general law taxed all the railroads in the Commonwealth, and held to embrace this, because there was a provision in the charter that it should come under the act of 1849, which contained a clause giving power to the Legislature to resume, alter or amend the charter. Probably more than twenty decisions might be found in this and other States to the same general effect. It is useless to cite authorities to show that a charter is a grant, and a grant is a contract executed, equally binding on the State as any other contract; but where the power to revoke or alter is contained in the grant, it can scarcely be pretended that the power to *change* does not exist, even when thereby additional burdens are thrown on the corporation.

A reservation of power in the Constitution is certainly not less potent than when found in an act of assembly. The Legislature could not divest itself of the power, even if it would undertake to do it by the most express words. Since the constitutional amendment of 1857, it has been unnecessary to reserve the power of alteration, amendment or revocation in any statute of incorporation.

It is urged that the charter was in the statute book, and therefore there was no necessity to furnish a copy. It might be sufficient to answer that the act of assembly requires it to be done. There is, however, some reason for the order. The act requires the commissioner to furnish copies from his office, certify them under seal, and makes such papers evidence. How could he certify to that which was not in his office? The 8th section of the act requires these copies from every insurance company, also a certificate showing the time of its organization, its place of business, and the names of its officers. Even fire insurance companies, exempted from certain of the duties enjoined by the statute under the 17th section, are not relieved from those required by the 8th section.

It is said by the defendant that an improper burden is imposed on it by the 8th section, which requires it to pay a fee of \$25 for filing a copy of its charter with the commissioner, as it had already paid into the State treasury \$100 for its enrolment. We are not now called on to decide whether this fee is or is not proper. If that question was intended to be raised, the defendant could have had a duly certified copy made out and tendered, together with a certificate of the other matters required by the 8th section of the act, and if the officer refused to receive them without the fee, we could have determined whether it was or was not a compliance.

We must next consider the complaint against this insurance company in failing to furnish a statement of its condition and business as

required by the 12th section of the act. It is conceded that no statement whatever was furnished by this company, although it received from the commissioner a blank form of the return to be made, which is annexed to the answer. The excuse is that the form did not fit its business transacted, therefore it could not comply. The actual form of business done, with its nature and character, was not made known to the commissioner as it has been laid before the court. He could only look to the charter as found in the statute book, and to which he was referred, and would have a right to believe that the corporation carried on all of the business there authorized.

It has authority to purchase and hold land and goods; is required to elect officers; have stock to the amount of \$100,000, which it may increase to \$250,000. The instalments to be paid in, with the method of enforcing, are designated. It has power to insure against fire, take marine risks, life policies, either on the stock or mutual principle, and to set apart its net profits and create a permanent fund to be paid out at interest in the mode there designated. Many of the blanks in the form furnished by the commissioner could have been filled by the company. It could have stated the names and residences of all of its officers, designating their respective positions, time of its organization and commencement of business, location of its principal office, amount of capital and how much paid in, amount of loans and how secured, notes and loans in any form, the value of real estate owned, the market value of its stocks and bonds, the cash on hand or in bank, postage and revenue stamps, interest on loans, premium notes, rents accrued, premiums uncollected, etc. On looking over the whole of the form, it will be found that there are very many other matters which could, with great propriety, have been answered affirmatively or negatively. It was important to make known to the commissioner whether it was taking fire and marine risks as well as life insurance, and whether the latter was solely on the mutual principle or partially on that, and also for cash premiums.

The defendant contends that as it was purely a mutual life insurance company in its mode of doing business, it was not bound to make any report. That we conceive is an error, as it is only mutual *fire* insurance companies which are excused. Even they must answer when called on by the commissioner, to enable him to ascertain their true character and condition. All of the provisions of the twelfth section have been most clearly violated by the defendant.

Independent of the constitutional principle already cited, which gives full authority to the Legislature to change, modify, or repeal the charter of this company, another equally potent exists, *the police power of the State*. This is incident to every government. Persons and property of all kinds are subject to general restraints and burdens, in order to secure the welfare and prosperity of the State at large. The interests of the few must yield to the wants of the many.

In passing the act of April 4, 1873, it is very manifest that the Legislature desired to protect the citizens of the State from the frauds daily practised on them by companies both foreign and domestic, underwriting policies of insurance, and receiving premiums therefor, when they had no means whatever of meeting the loss, should it occur. Therefore the

office was established, and a commissioner appointed to look into and carefully investigate the pecuniary condition of every insurance company or individual engaged in that business throughout the Commonwealth. The object was proper and meritorious, the means well calculated to meet the end, and the burden thrown on the companies comparatively small and inconsiderable. It has been repeatedly held that the power of the Legislature on this subject extends alike to corporations and individuals. See *Thorpe vs. R. & B. Railroad Company*, 27 Vermont, 140, where a railroad company was compelled to fence its road, or pay for all stock injured or destroyed.

For the general legislative authority under this head of jurisprudence, we refer to Cooley's Constitutional Limitation, 572 to 597, and the cases there cited. Under this principle, the act of assembly could be enforced without the constitutional principles being invoked. The defendant was not protected from a full compliance with the law by reason of any implied contract in its charter.

A difficulty exists as to the judgment to be rendered by this court. The proceeding was commenced and carried on by the commissioner and attorney-general, under the eighth division of the fifth section of the statute. The complaint is for non-compliance with the provisions of the eighth and twelfth sections of the act. The mandate of these sections, as already stated, has been disobeyed and disregarded. The portion of the statute cited, then goes on to provide that if it shall appear to the satisfaction of the court or judge that such company is insolvent, or that the interests of the public require it, said court or judge shall decree a dissolution of such corporation and distribution of its effects. It has not been shown that this corporation is insolvent, or is carrying on business to the injury of the community; we therefore cannot dissolve the corporation or vacate its charter.

There are various provisions in the statute inflicting penalties on the corporations, and authorizing a suspension of their business by an order of the insurance commissioner for a non-compliance with the law; but that power is not conferred on the courts as it probably should have been. We can only therefore say, that the order of suspension was correct, and the same must remain, so far as regards any action of the court. But for the violation of the law, it is ordered and adjudged that the defendant pay the costs of this proceeding.

Lyman D. Gilbert, Esq., Deputy Attorney-General, and *Hon. Samuel E. Dimmick*, Attorney-General, for the Commonwealth.

D. C. Harrington, Esq., for the defendant.

Court of Common Pleas of Luzerne County.

[Leg. Int., Vol. 31, p. 21.]

BOUTON vs. ROYCE.

1. Where a statute repeals absolutely a prior law, and substitutes other provisions on the same subject, even though the latter seem designed to subserve but a temporary purpose, the prior law does not revive when the repealing statute is spent, unless the intention of the Legislature to that effect is expressed.
2. The act of April 4, 1872, changing the time of holding the municipal elections in the city of Scranton, from the first Tuesday in June of each year, to the first Friday in May, and repealing "all acts and parts of acts inconsistent" therewith, was not designed to blot out all laws for the holding of municipal elections in that city after the year 1872. Though inartistic and vague in its terms, still there is enough about it to indicate the legislative intent, which was to change the time of holding the municipal elections, not for the year 1872 alone, but permanently thereafter.
3. While school directors elected prior to the beginning of a current school year cannot exercise any control over the schools, nor any of the powers pertaining to their office, until the full term of their predecessors has expired, yet, after that has taken place, their official functions attach, and they are entitled to meet with the continuing members of the board, and to participate both in the temporary and permanent organization.
4. The first business of a school board, composed of continuing and newly elected members, is to organize by choosing a president, secretary, and treasurer. This is best accomplished, ordinarily, by effecting a temporary organization; whereupon the returns of the election are read, or the certificates of the directors elect are presented, and thus, all the members alike participate in the permanent organization. If a permanent organization cannot be accomplished, however, because no one of the members can obtain a majority of votes for president, it is such neglect of duty as will justify the proper court, upon application made according to law, to declare their seats vacant, and appoint others in their stead.
5. The continuing members of a school board are not judges of "the legality of any election of directors." The statute authorizes and requires the Court of Quarter Sessions, whenever not less than six qualified citizens of a district contest an election, "forthwith to examine into it, and to confirm or set it aside, as shall seem just and proper; and if set aside to order a new election," etc.
6. The law authorizing "less than a majority" of directors to fill vacancies in a school board, only applies where the number has been thus reduced from the causes mentioned in either the seventh or the eighth section of the act of May 8, 1854, P. L. 618, *Purd.* 239, 240, pl. 23, 23, or from both combined.

In equity. Opinion delivered *January 5, 1874*, by

HARDING, P. J.—The plaintiff's bill of complaint is substantially as follows:

1. That he is a citizen and tax-payer of the Fourth school district of the city of Scranton, composed of the Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth wards of said city.

2. That C. E. Royce, the defendant, claims to be a member of the school board of said district, and receiver of taxes therein; and, as such receiver, has demanded from the plaintiff and other tax-payers of the district, the school-tax assessed against them for the year 1873, and because of non-payment of the amount assessed against the plaintiff, the said Royce has issued a warrant and caused the personal property of the plaintiff to be levied upon and advertised for sale.

3. That the defendant claims to be such tax receiver by virtue of an act of assembly, entitled "An act relating to the duties of the secretary of the school board of the Fourth school district of the city of Scranton," approved April 4, 1872, and by virtue of his election as

such secretary, on the 6th of June, 1873. The plaintiff, however, says he is informed and believes that the election referred to, was without authority of law and void for the following reasons: First, that the board of school directors for the district is composed of nine directors, three of whom are elected each year, and all hold their offices severally for the term of three years: Second, that on the first Friday of May, 1873, an annual election of school directors took place, and Patrick Blewitt, R. T. Black, and M. J. Walsh, were elected respectively for the Seventh, Eighth and Ninth wards of the district: Third, that on the 6th day of June, 1873, the recently elected directors, Blewitt, Black and Walsh, and the continuing members of the board, the defendant being one, met at the proper place in the city of Scranton, to organize the new board for the current school year, agreeably to law: Fourth, that the defendant and two other of the continuing members, E. C. Lynde and J. W. Schultz, refused to recognize Blewitt, Black and Walsh as directors, alleging that their election was altogether void, because the first Friday of May, 1873, was not the proper day for holding elections for school directors in the city of Scranton: Fifth, that the three other continuing members, however, did recognize the said newly elected members as directors, and acting with them, or, at least, with Blewitt and Walsh, an organization of the board was effected by the election of Patrick Blewitt, president, and M. J. Walsh, secretary: Sixth, that Royce, the defendant, and Lynde and Schultz remained in the room while the organization took place, protesting against it, however, as illegal and unauthorized; and, even while the directors were present who participated in the organization, the defendant Royce, and Lynde and Schultz, attempted another organization, and began balloting for a president. Whereupon, the directors who had already organized the board, withdrew from the room. The second organization was then completed by the election of E. C. Lynde, president, and the defendant, C. E. Royce, secretary.

4. That the election held in the city of Scranton, on the first Friday of May, 1873, was strictly in accordance with law, and that Patrick Blewitt, R. T. Black, and M. J. Walsh, were duly elected directors from their respective wards, and entitled to their seats as members of the board of school directors of the Fourth school district of the city of Scranton.

5. That the action of the defendant, Royce, he not having been elected secretary of the lawfully organized school board of the Fourth school district of Scranton, in issuing a warrant and levying upon the plaintiff's property, besides being prejudicial to the plaintiff's interests, is wholly without authority of law; and further, that if the defendant is permitted thus to collect the school tax, the plaintiff and all other taxable citizens of the said district will be greatly injured thereby.

The bill concludes with a prayer on the part of the plaintiff, as well in his own behalf as in behalf of other taxable citizens of the district, that an injunction may issue restraining the defendant from collecting the said school tax from the plaintiff, or from the other taxable inhabitants of the district.

The defendant, in his answer, does not set up anything seriously con-

tradictory of the material matters charged in the plaintiff's bill. He denies, however, the legality of the May election *in toto*; he recognizes Blewitt, Black, and Walsh, as "citizens," not "directors" of the Fourth school district of the city of Scranton; he alleges that the office of school director in the said Seventh, Eighth and Ninth wards, respectively, was vacant on the 6th of June, 1873; he insists that the organization of the school board by the election of Blewitt, as president, and Walsh, as secretary, was illegal; he claims that the organization subsequently effected by the election of Lynde, as president, and himself, as secretary, was in strict conformity with law; and that, therefore, his action in issuing a warrant, and levying upon the property of the plaintiff, is lawful and right.

It will be seen at a glance that the bill and answer raise, at least, these questions:

First. When is the proper time for holding the municipal elections in the city of Scranton?

Second. What are the rights of recently elected school directors when the time arrives to organize the school board for the then current year, in conjunction with the continuing members of said board?

Third. What constitutes a proper and lawful organization of a school board?

As originally established by statute, P. L. 1866, p. 1035, the time for holding the municipal elections in the city of Scranton was the first Tuesday of June in each year. The act of April 17, 1869, commonly known as the "registry law," requiring all elections for city, ward, borough, township and election officers, to be held on the second Tuesday of October in each year, was not lasting in this respect; the first Tuesday of June was soon restored as the day for the holding the charter election in Scranton.

On the 4th of April, 1872, however, an act of assembly was passed, P. L. 961, entitled, "A supplement to an act to incorporate the city of Scranton, changing the date of the election of certain officers." It contains five sections, but only the first and second sections need be specially examined in disposing of the particular branch of the case now under consideration. The first section is in these words: "That the next election for district attorney of the mayor's court for the city of Scranton, for clerk of said court and for marshal of said court, shall be held in the said city of Scranton, in the borough of Dunmore, and in the townships of Covington, Jefferson, Madison, Spring Brook and Roaring Brook, said city, borough and townships being in the county of Luzerne and within the jurisdiction of the said mayor's court, on the first Friday of May, in the year of our Lord one thousand eight hundred and seventy-two; and that all officers of the said city of Scranton, to be voted (for) as prescribed in the original charter of said city, and its supplements, the first Tuesday of June next, and on the day of the next general election, shall be voted for by the qualified electors of said city, on the said first Friday of May, Anno Domini one thousand eight hundred and seventy-two; and that it shall be sufficient notice of said election this year, to the qualified electors of said city, borough and township, to publish this act five times previous to the day of said election in any four papers published in the said city, borough and townships, as the majority of the

members of the Legislature from Luzerne county may designate in writing, the proper costs of said publication to be paid by the treasurer of said city out of the city funds."

The second section follows, thus: "That the returns of said election shall be made after two o'clock, afternoon, on the Saturday next after the day of said election; and all acts and parts of acts inconsistent herewith are hereby repealed."

The three remaining sections relate to the division of certain wards into election districts, and the establishment of places for holding the elections therein. They are not at all important in connection with the issue involved here, except, possibly, in so far as they might render the whole act liable to the curse fulminated in the amendment of 1864 to the constitution—"No bill shall be passed by the Legislature, containing more than one subject, which shall be clearly expressed in the title, except appropriation bills." It was decided, however, in *Commonwealth vs. Green*, 8 P. F. S. 226, and also in *Yeager et al. vs. Weaver*, 14 P. F. S. 425, that it was not intended by this provision, that the title of an act of assembly should be a complete index of its contents. Besides, the whole five sections are *in pari materia*, and concern exclusively the city of Scranton—the first two fixing a time for holding the municipal elections generally, and the last three a place for holding them in certain newly created election districts, respectively.

But to recur directly to the question—When is the proper time for holding the municipal elections in the city of Scranton? That the act of April 4, 1872, as it stands upon the statute book, is inartistic, and to some extent, vague in its terms, no one will pretend to deny; but, whether the difficulty was caused by imperfect or careless transcribing, or whether it arose from heedless framing originally, is a matter now necessarily of mere conjecture. We must seek the intention of the Legislature; and finding it, if that be possible, we must construe the act accordingly. This is the cardinal rule of construction after all. Dwarria, in his work on Statutes, § 698, says, "The safe and established rule of construction is, that the intention of the lawgiver and the meaning of the law, are to be discovered and deduced from a view of the whole and of every part of a statute taken and compared together." We may now consult even the title of an act of assembly in looking after the legislative intent. This was not the old rule, however. In *Mills vs. Wilkins*, 6 Mod. 62, Holt, Chief Justice, says, "The title of an act of parliament is no part of the law, no more than the title of a book is part of the book; for the title is not the law, but the name or description given to it by the makers." But in the case of *United States vs. Fisher*, 2 Cranch, 386, Chief Justice Marshall says, "Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." And in the Supreme Court of this State, it was held, *Penna. Railroad Co. vs. Riblet*, 16 P. F. S. 164, that since the amendments of 1864 to the constitution, the title of an act of assembly is part of it.

How is it with the title to the act under consideration here? The purpose announced in it is a change in "the date of the election of certain officers." The beginning of the first section of the act indicates the

"officers" referred to, naming them, as the district attorney, the marshal and the clerk of the mayor's court; and yet, further along, it appears in direct terms that the contemplated *change* applies to all officers of the said city of Scranton, etc. It will be seen, therefore, that the *title* fails to indicate the true purpose of the act, even as respects the change in the election of officers under the city charter, to say nothing about the division of wards, and the consequent establishment of additional election districts. In short, the title is of no avail whatever, in leading us to the legislative intent, further than that, taken in connection with the first section of the act, a purpose to change the time of holding the municipal elections in the city of Scranton is clearly manifest.

Was this change to be for the year 1872 alone, or was it to be permanent? Herein lies the controversy; herein practically rests the whole case. And at this point, we remark, that if there was nothing else to be considered, but the language of the section alone, "shall be held in the said city of Scranton . . . on the first Friday of May, in the year of our Lord one thousand eight hundred and seventy-two," a correct adjudication could be reached at once; and the same would be equally true, if after the language already quoted, there had been added the words, "and annually thereafter." But notwithstanding the omission, we think, by adopting "the safe and established rule of construction," namely, "the intention of the lawgiver and the meaning of the law . . . to be discovered and deduced from a view of the *whole* and of every part of it, taken and compared together," every difficulty fades away.

And here we may ask, why the city of Scranton should afford the only example in the Commonwealth, or elsewhere even, of invoking legislative enactment to change the time of holding her municipal elections *but for a single year*? What had occurred already, or what was likely to occur during the particular year, 1872, which made it necessary for the Legislature thus temporarily to blot out an established election day under a city charter, and fix another, but little more than a month in advance of it? The usual prelude to such extraordinary legislation is a preamble setting out the causes. No preamble is here, however. And in the very able argument which was made on the part of the defendant, not a cause was suggested for legislation confessedly so anomalous.

Again, if the time for holding the municipal elections was to be changed only for the year 1872, and not permanently, it seems clear that the concluding language of the first section of the act, relating to notice, would have been thus—"and . . . it shall be sufficient notice of said election, to the qualified electors of said city . . . to publish this act five times previous to the day of said election in any four of the papers published in the said city . . . as the majority of the members of the Legislature from Luzerne county may designate in writing," etc. This would have been measurably explicit. Moreover, the section would have been complete. Not one word more was necessary. But such is not the language. On the contrary, it is thus:—"and . . . it shall be sufficient notice of said election *this year*, to the qualified electors," etc. Now, the implication is irresistible, unavoidable, that for succeeding years the ordinary method, as prescribed in the charter, of giving notice to the electors of the time of holding elections therein, was

to be continued. The singular method prescribed by the act, was to operate but for "this year," namely, the year 1872.

And again, the first section of the act under consideration, was all the legislation requisite to change the time of holding the municipal elections in the city of Scranton, if a change for the year 1872 only was contemplated. The second section was mere surplusage—it was not needed at all to accomplish the purpose. The repeal of a word or a line of the original charter, or any of its supplements, was not necessary. And yet, a second section was enacted which contains a repealing clause of unlimited application as respects all prior laws relating to the time of holding the municipal elections in that city. The language is thus:—"all acts and parts of acts inconsistent herewith are hereby repealed." Now, as every act relating to the time of holding these elections in Scranton, whether a part of the original charter, or of any supplement thereto, was inconsistent with holding them on the first Friday of May, 1872, it follows, of course, that every one of them was repealed, thus leaving the city, after the year 1872, without any law to authorize the holding of municipal elections.

This conclusion cannot be escaped. The act of 1872, now in question, and which the defendant claims was but temporary in its operation, repealed absolutely, as we have seen, all prior laws inconsistent with it, and substituted in their stead other provisions on the same subject, but made no provision for their revival after its own force had been spent. In the Court of King's Bench, *Warren vs. Windle*, 3 East, 205, it was said substantially by Lord Ellenborough, C. J., all the other judges concurring, that where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the Legislature to that effect be expressed.

Now, in the case before us, if the words "so far as the year 1872 is concerned," had been incorporated in the repealing clause, making it read, "all acts and parts of acts inconsistent herewith, *so far as the year 1872 is concerned*, are hereby repealed," the legal effect of the section, besides securing the purpose in view, would not have been to wipe out irrevocably all prior laws relating to the same subject.

But taking the section as it stands, *as it is*, not as it might have been, and recognizing its full, legitimate force, who can urge successfully that the Legislature intended by this law to change the time of holding the municipal elections in the city of Scranton temporarily, or but for the single year 1872? Why, all that was required to make this act perfect legislation to change permanently the time of holding these elections, from the first Tuesday of June in each year, to the first Friday of May, was the addition of the words, "and annually thereafter," in the first section of the act, following the words, "one thousand eight hundred and seventy-two." In *Brinsfield vs. Carter*, 2 Kelly, 143, the word "grant" was inserted in the statute by the court, where the Legislature evidently designed it should be, as shown by other parts of the law, and where, if it had not been so inserted, the purpose of the law would have been frustrated. So in *Cochran vs. Library Company*, 6 Philada. 492, Judge Sharswood held that the word "foreign" belonged to the sixth

section of the act of April 8, 1851, entitled "An act relative to service of process on foreign insurance companies and other corporations," although the language of the section itself was, "in any case where *any* insurance company or other corporation," etc.

But without adding by implication a single word to the statute under consideration, and regarding only the language used, and the circumstances and facts existing at the time, we cannot avoid the conviction that the Legislature designed to change the time of holding the municipal elections in the city of Scranton, not temporarily, but permanently. Adjudication necessarily follows then, that so far as a properly appointed day was concerned, the municipal election held in the city of Scranton, on the first Friday of May, 1873, was in conformity with law.

It was alleged in the argument on the part of the plaintiff, and not contradicted by the other side, that the qualified voters of the city of Scranton met at the proper election polls in that city on the first Friday in May, 1873, and elected such municipal officers as were to be chosen during that year, not doubting, of course, that the Legislature had permanently changed the time for holding the municipal elections. Again, as a matter not entirely foreign, at least, to the *merits* of the present controversy, the fact appears in the report of the master, and may properly be mentioned here, that Mr. G. A. Fuller, one of the acting school directors of the Fourth school district of the city of Scranton, who voted for the defendant for secretary of the board, recognized the first Friday of May, 1873, as the proper day for electing a school director in the Ninth ward of that district; for, as shown by the evidence returned with the report, he *chanced* an election there on that day himself, but was not successful. Had he been, however, the first Friday in May, 1873, very possibly might not have been considered as an improper day for holding the municipal elections in the city of Scranton; indeed, Mr. Fuller might have been in the school board by popular election, and not by appointment.

A somewhat novel point was urged in the argument on the part of the defendant, namely, that the office of school director was neither a ward nor a city office; and that, therefore, even though the time for electing ward and city offices had been changed by positive law, still the time for electing school directors must necessarily continue as before. This position is altogether untenable. Apart from the fact that there is no provision in the charter of the city of Scranton, nor in any of the supplements, authorizing the election of school directors on any other day than that appointed for the election of city and ward officers, the twenty-fifth section of the act of 30th of March, 1867, extending and defining the powers of the city, P. L. 636, organizes the school districts, and provides in terms that the directors shall be elected "at the city elections." The time for holding the "city elections," as we have seen, having been fixed by statute to take place on the first Friday of May in each year, it follows, of course, that the election of school directors must also take place on that day.

We come now to consider of the rights of recently elected school directors when the time arrives to organize the board for the current school year, in connection with the members whose terms of office still continue. In the townships throughout the State, and in some of the cities and boroughs, school directors are elected nearly three months

prior to the beginning of the current school year. But, yet, they cannot exercise any control over the schools, nor any of the powers pertaining to their office, until the full term of their predecessors has expired. When this has taken place, however, their official functions attach; and on presentation of their certificates, or other proper evidence of their election, they are entitled to meet with the continuing members of the board, and to participate both in the temporary and permanent organization. A decision, purporting to be by a former State superintendent of common schools, certainly very high authority in such matters, has been referred to, and urged as being in conflict with the doctrine just laid down. The language of the decision is this: "Directors elect can exercise none of the powers pertaining to their office till after the organization of the new board, which cannot take place till after the first Monday in June." Now, it is not meant by this that the continuing members of the board shall, exclusively and by themselves, organize it for the current year, and then admit the directors elect. The decision, indeed, does not refer to the organization of the board at all; but, on the contrary, it refers simply to the time when directors elect may enter into participation in the control over the schools, and may also exercise other powers pertaining to their office.

But as the first duty of school directors, at their annual meeting in "cities and boroughs," is to organize, let us see in what a lawful organization consists, and how it is to be reached. The first part of this inquiry, the statute answers, Purdon, 240, pl. 28: "Shall meet and organize by choosing a president and secretary, who shall be members of the board, and a treasurer," etc. This is the only sort of organization known to the law: there can be, therefore, none other. If the difficulty arises which the members of this particular school board encountered on the evening of the 6th of June last, then the ninth section of the act of May 8, 1854, Purd. 220, pl. 24, meets it at once: "If all the members of any board of directors . . . shall neglect or refuse to perform any . . . duty enjoined by law, the Court of Quarter Sessions of the proper county may, upon complaint in writing by any six taxable citizens of the district, and on due proof thereof, declare their seats vacant, and appoint others in their stead, until the next annual election for directors." Now, conceding all that is claimed on the part of the defendant respecting the illegality of the election on the first Friday of May, 1873, and assuming that vacancies in the office of school director existed in the said Seventh, Eighth, and Ninth wards, there was still a majority of the board of directors for the district in existence. E. C. Lynde, J. W. Schultz, Anthony Kelly, Jos. Grieser, John Brazelle, and the defendant, C. E. Royce, held over. It was their duty, under the law, to organize the board. This was the first work they had on hand. Indeed, they could lawfully do no other work until this had been done. And that the statute just quoted applied to their case, there is not even a shadow of doubt. In 2 Wh. Dig. 605, pl. 11, a decision of the State superintendent strikes the point squarely: "If a board of directors fail to organize because none of them can obtain a majority of votes for president, it is such neglect of duty as will justify the Court of Quarter Sessions, upon the complaint of six taxable citizens of the district, and upon due proof thereof, to declare their seats vacant, and appoint others in their stead."

But having already decided that the first Friday of May, 1873, was the proper day for holding the municipal elections in the city of Scranton, and presuming that Patrick Blewitt, R. T. Black, and M. T. Walsh, were then lawfully chosen school directors from the Seventh, Eighth, and Ninth wards, respectively, how should the board have been organized? Why, manifestly, when a board is composed in part of continuing, and in part of newly elected members, a temporary organization may be effected for the purpose of ascertaining who the directors elect are. And here, we remark, that when certificates of election, duly vouched by the lawful officers of an election board, or the returns of the elections themselves are presented, showing who the directors elect are, it is not for the continuing members of the board to sit in judgment on "the legality of the election." The certificates, or the returns of the election, as the case may be, when thus presented, constitute evidence, *prima facie*, entitling the persons referred to in them to seats in the board. And in case there should be a question about the right of such persons to hold their seats, growing out of any informality or illegality connected with the election, the sixth section of the act of 1854, *Purd.* 239, pl. 21, provides the course to be pursued: "If the legality of any election for directors be contested, in writing, by not less than ten qualified citizens of the district, the . . . Court of Quarter Sessions is hereby authorized and required forthwith to examine into the election, and to confirm or set it aside, as shall seem just and proper; and if set aside, to order a new election," etc.

We turn, in conclusion, to the report of the master, with a view of ascertaining how far there has been a conformity on the part of the members of this particular school board, with the principles herein laid down. After a preliminary recital of the case, the master continues as follows: "The six members of the board whose terms did not expire on the first of June last, are Anthony Kelly, Joseph Grieser, John Brazelle, E. C. Lynde, J. W. Schultz, and the said C. E. Royce. The old board, prior to final adjournment, fixed upon the evening of 6th of June last, at seven and a-half o'clock, as the time, and the Central school building in Scranton, as the place, for the organization of the new board. At the time and place mentioned, the six continuing members, and the three claiming to be newly elected, met, and Kelly, Grieser, and Brazelle, acting in concert with Blewitt and Walsh, proceeded to vote for Walsh for chairman *pro tem.*, and Brazelle for secretary *pro tem.*; and then Walsh, acting as chairman, read the returns from the Seventh, Eighth, and Ninth wards, and declared himself, and Blewitt and Black, as duly elected. For the purpose of permanent organization, Messrs. Kelly, Grieser, Brazelle, Blewitt, and Walsh, voted for Blewitt for president, Walsh for secretary, and Grieser for treasurer. The other three continuing members, Messrs. Lynde, Royce, and Schultz, together with Mr. Black, voted no, as each vote was taken; and Lynde, Royce and Schultz protested that the whole proceeding was irregular and without authority of law, and that Messrs. Blewitt, Black and Walsh had not been duly elected as school directors for the year 1873.

For convenience, the master designates Mr. Blewitt and the gentlemen acting with him, as the "Blewitt board," and Mr. Lynde and the gentlemen acting with him, as the "Lynde board." He then proceeds:

"After voting a levy of tax for the present year, the 'Blewitt board' adjourned, but all continued to remain in the room." Now, upon the state of facts thus reported by the master, we have no hesitation in pronouncing the "Blewitt board" lawfully organized. It follows, therefore, that any other or further organization of the board by the other directors on that evening, could not have been in conformity with law.

But to continue with the report: "Then Mr. Royce, the president of the board for the year 1872, called the six continuing members to order, and stated that the object was to organize the board for the coming year, according to law and the custom of that body, and he proposed Mr. Lynde for temporary chairman. Lynde, Royce and Schultz voted aye, and Kelly, Grieser and Brazelle voted no. After several ballots, Brazelle left the room, and another vote being taken, Mr. Lynde received three votes as against two, and was declared elected. Upon his taking the chair, Mr. Blewitt protested, and attempted his removal; but finally the whole 'Blewitt board' retired from the room. The three continuing members who remained then declared vacancies existing in the Seventh, Eighth and Ninth wards, on the ground that there had been no legal election in said wards, and proceeded to vote for R. T. Black to fill the alleged vacancy in the Eighth ward, and he was declared elected. The same three continuing members and Mr. Black then voted for G. A. Fuller as a director for the Ninth ward; and he being declared elected, the same three continuing members, together with Messrs. Black and Fuller, then voted for Mr. Blewitt as director from the Seventh ward, and he was declared elected. Immediately after this, these gentlemen concluded a temporary organization, with Lynde as chairman, and G. A. Fuller as secretary; and for purposes of permanent organization for the year 1873, Lynde was elected president, C. E. Royce, secretary, and J. W. Schultz, treasurer, by the unanimous vote of the five present."

Thus, the "Lynde board" had its origin. We need not repeat that it was without authority of law in every aspect of the case. And even though we had not already held that the "Blewitt board" was the lawfully organized school board of the Fourth school district of the city of Scranton, we could in no possible way recognize the "Lynde board" as representing any semblance of a lawful organization. We have already shown that the first duty of the six continuing school directors of this district, being a majority of the whole number, was to organize the board; and, in fact, that they could do nothing else lawfully until this had been done; we have shown, out of the very mouth of the statute, what an organization consisted in—"Annually . . . after the election, . . . each board of school directors . . . in cities and boroughs, shall meet and organize by choosing a president and secretary, who shall be members of the board, and a treasurer," etc.; we have shown that whenever they failed to do this, the statute authorized the proper court, *under the very circumstances conceded to have existed here*, namely, a failure to elect a president because no one of the directors could obtain a majority of the votes, to declare their seats vacant, and appoint others in their stead; and yet, these "three continuing members," Lynde, Schultz, and the defendant, Royce, in bold default of observance of these plain statutory provisions, assumed to exercise the highest prerogative incident to the office of school director, namely, that of filling

vacancies in the board without consulting the popular will. Why, conceding that vacancies existed, they had no right thus to fill them. The seventeenth section of the act of May 8, 1854, Purd. 241, pl. 33, has been referred to as warranting their action in this respect: "If less than a majority of directors . . . attend any meeting, no business shall be transacted thereat, except that of adjournment, and of appointment to fill vacancies, *as is hereinbefore directed*." Now, the words, "as is hereinbefore directed," refer to the eighth section of the same act, Purd. 240, pl. 23, which *only* authorizes the declaring and filling of vacancies where "any person duly elected a school director shall refuse to attend a *regular* meeting of the board, after having received written notice from the secretary to appear, and enter upon the duties of his office;" or where "any person, having taken upon himself the duties of his office as director, shall neglect to attend any two *regular* meetings of the board *in succession*, unless detained by sickness, or prevented by absence from the district;" or where a director refuses "to act in his official capacity when in attendance," etc. The courts, too, construe strictly this authority of declaring and filling vacancies in a school board, without consulting the popular will. In *Zulich et al. vs. Bowman*, 6 Wr. 83, it was decided that the seat of no member of a school board could be declared vacant, and a new member appointed in his stead by the other directors, unless he had failed to attend two *regular* meetings of the board *in succession*; failure to attend two *special* meetings *in succession* was held to be not enough.

It is true that the meeting in the case before us was a *regular* meeting; but the *vacancies* were not occasioned by the causes enumerated in the statute as quoted; nor were they occasioned "by death, resignation, removal from the district, or otherwise," so that the whole number had been reduced to "less than a majority." On the contrary, two-thirds of the whole number of directors composing the board in that district were not only alive, but they actually resided within the borders of the district. The law authorizing "less than a majority" of directors to fill vacancies in a school board, only applies where the number has been thus reduced from the causes mentioned in either the seventh or the eighth section of the act to which we have referred, or from the two combined.

Wherefore, it *was*, on the twenty-ninth day of November, A. D. 1873, considered, adjudged and decreed, the case having been heard upon bill, answer and proofs, and having also been fully argued by counsel on both sides, that an injunction issue as prayed for in said bill, to perpetually enjoin and restrain the defendant, C. E. Royce, from proceeding to collect the school-tax in the Fourth school district of the city of Scranton, and from collecting the same from B. A. Bouton, the plaintiff, or from any other taxable citizen, living in, or having property in said school district, and that the costs of this proceeding be paid by the defendant.

A. A. Chase and H. W. Palmer, Esqs., for plaintiff.

Hon. H. M. Hoyt, Hon. W. W. Ketcham, D. M. Hannah and C. E. Royce, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 173.]

JONES vs. THE DELAWARE AND HUDSON CANAL COMPANY.

1. Where judgment has been entered by a justice against a defendant who was in default, but who, within twenty days, entered bail for an appeal which he neglected to bring into court, *certiorari* will not avail to set aside an execution subsequently issued, even though the service of the summons be shown by the record to have been defective. Taking the appeal amounts to a recognition that the case was regularly before the justice, and is a waiver of the defect which otherwise would have been fatal.
2. An agent may appear before a justice and take an appeal. The justice is the judge of the agent's authority, which, it must be presumed, was satisfactorily shown.

Opinion delivered *March 19, 1874*, by

HARDING, P. J.—The summons in this case issued *March 25, 1872*, returnable *April 1*, following. A sworn service is indorsed thereon as follows: "Served *March 27, 1872*, on the within named defendants, by leaving a copy of the original summons at their office in *Scranton*."

The defendants were in default on the day of return. The justice, however, proceeded to hear the plaintiff's "proofs and allegations," and thereupon entered judgment in his favor for the amount of his claim. Within twenty days next ensuing, the defendants, or some one for them, entered bail for an appeal. As our terms are arranged, this appeal need not have been filed until the third Monday of *October, 1872*, that being the first day of the term next succeeding the taking of the appeal. The defendants, however, for reasons which are not material in this connection, neglected to bring their appeal into court. Subsequently the plaintiff issued execution to collect his judgment. A few days afterwards the execution was arrested by a *certiorari* from this court.

The exception to the record of the justice is, "that the service of the summons was insufficient in law, inasmuch as it does not show that any person whatever was served, or notified of the existence of the summons." That there was no legal service of the summons cannot be disputed; but the defendants, by appearing and entering bail for an appeal within the statutory limitation, treated the case as being regularly before the justice, and thus waived the defect which otherwise would have been fatal.

It is further objected that the record does not show that the party who took the appeal was an agent of the defendants, or that he was authorized to act for them in this, or any other particular. A party may appear before a justice as an agent, and the justice is the judge of the authority of the agent to represent the principal: *Barber vs. Chandler*, 5 H. 48.

The defendants here had the benefit of the delay produced by taking the appeal. As we have seen, they failed altogether to bring their appeal into court; and, six months afterwards, when the plaintiff took steps to enforce the collection of his judgment, they seek by *certiorari* to avail themselves of a defect which they had previously waived. Their writ comes too late; the proceedings are affirmed.

Messrs. Foster & Lewis, for defendant.

[Leg. Int., Vol. 31, p. 230.]

MORRIS et al. vs. HANNICK.

1. The statute of limitations never extinguishes a debt; it only forms a bar to the remedy to recover it by action.
2. Where several remedies are given, the party entitled to them may select that which is best calculated to serve his ends.
3. The act of February 24, 1806, authorizing judgments to be entered by the prothonotary on notes and other instruments, with confession of judgment attached, gives an additional remedy for collection to which the statute of limitations does not apply.
4. Where a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the form of a note, with confession of judgment attached, it may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it.

Rule to open judgment. Opinion delivered *April 6, 1874*, by

HARDING, P. J.—It is conceded here that the defendant became indebted to the plaintiffs, during the early part of the year 1865, in the sum of one hundred and twenty dollars, for which he gave a note as follows:

"\$120.

PITTSBURGH, Feb. 7, 1865.

One month after date, I promise to pay Morris & Walsh, or bearer, one hundred and twenty dollars, with interest, without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, with interest, costs of suit and a release of all errors, waiving inquisition, and confessing condemnation on real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

(Signed)

MICHAEL HANNICK."

The plaintiffs held this note eight years and upwards, or until December 15, 1873, when they made application to the prothonotary to have judgment entered upon it against the maker, which was accordingly done; and thereupon they proceeded by execution to collect their money.

At this stage of the case, the defendant came in with an affidavit, setting forth several matters by way of avoidance, but alleging specially, that if the plaintiffs were permitted to proceed with their execution, he would be deprived of the right to interpose the plea of the statute of limitations. Indeed, as developed subsequently, this constituted the sole basis of his resistance to the proceedings on the judgment.

Can the plea, *non assumpsit infra sex annos*, avail in Pennsylvania against an ordinary note for a sum of money, with confession of judgment attached, where the holder has failed to have judgment entered against the maker, until the expiration of six years after the maturity of the note? The act of 27th March, 1813, *Purd. 930*, pl. 18, provides, "... that all actions of debt grounded upon any lending or contract, without specialty . . . shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, . . . within six years next after the cause of such actions, . . . and not after."

That the note in question is not a *specialty*, will be assented to at once. A *specialty* is defined to be a writing sealed and delivered, containing some agreement: 1 Binn. 261; 2 S. & R. 503; a writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified: Bac. Ab. Obligation, A. And though it be not said in the body of the writing that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty; but if it be not sealed, it is not a specialty, even though the parties in the body of the writing make mention of a seal: 2 S. & R., *supra*.

Again, a note of this character has no analogy with certain causes of action, not grounded in specialty, which have hitherto been adjudicated as being outside of the applicability of the statute of limitations. For example: it has no analogy with an action of debt on a foreign judgment, as in *Richards vs. Bickley*, 13 S. & R. 395; nor with a claim for a legacy, as in *Thompson vs. McGaw*, 2 W. 161; *Doebler vs. Snavely*, 5 W. 225; nor with the claim of a widow for interest on a third of the purchase-money on her husband's real estate, sold by an administrator, as in *Dillebaugh's Estate*, 4 W. 177; nor with a claim for a distributive share of personal estate under the intestate laws, as in *Patterson vs. Nichol*, 6 W. 379; nor with an award at common law, as in *Rank vs. Hill*, 2 W. & S. 56; nor with a recognizance in the Orphans' Court, as in *DeHaven vs. Bartholomew*, 7 P. F. S. 126. Being then neither a specialty, nor within the category of causes of action to which the statute of limitations does not apply, the inquiry is put with apparent pertinence, why should not the judgment be opened, and the defendant thereby allowed to avail himself of a plea which has had statutory recognition in this country for a century and a half and upwards?

In *Brown vs. Sutter*, 1 D. 240, Judge Shippen said, that the court would never open a regular judgment to let in a plea of the statute of limitations. But in *Ekel vs. Snavely*, 3 W. & S. 272, Chief Justice Gibson modified this doctrine somewhat, though the point then under consideration had reference to the form of action, and not to opening a judgment regularly entered. He said in that case, that the plea of the statute of limitations, being no longer an unconscionable one, as was considered in *Schock vs. McChesney*, 4 Y. 507, and in *The Bank vs. Israel*, 6 S. & R. 294, the rule of practice would not be recognized to the extent it had been in *Brown vs. Sutter*.

In disposing, however, of the question raised by the proceeding before us, it is not vitally material to what extent the rule of practice referred to may be recognized, either in respect to forms of action, on causes of action: it is enough that there is something else to be considered here besides the statute of limitations. The act of February 24, 1806, Purdon, 825, pl. 32, provides, that "it shall be the duty of the prothonotary of any court of record within this Commonwealth, on the application of any person being the original holder, or assignee of such holder, of a note . . . in which judgment is confessed . . . to enter judgment against the persons who executed the same, for the amount which, from the face of the instrument, may appear to be due," etc. Whenever, therefore, a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the

form of a note, with confession of judgment attached, it comes within the provisions of this act of assembly, and may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it. The act simply gives to the creditor or holder of the note an additional remedy for its collection. No principle of law is more firmly established than that, when several remedies are given, the party entitled to them may select that which is best calculated to serve his ends. It is not denied that the judgment here represents a subsisting indebtedness. Now, the statute of limitations never extinguishes a debt; it only forms a bar to the remedy of the holder to recover it by action: *Higgins vs. Scott*, 22 Eng. Com. L. R. 113; *Leasure vs. Mahoning Township*, 8 W. 551; *McCandless' Estate*, 11 P. F. S. 11. But it is not that remedy which these plaintiffs are pursuing; on the contrary, they have selected the remedy attaching to the confession of judgment, and to this the statute of limitations does not apply. They have indulged the defendant eight years and more; he seeks now to avoid payment altogether because he was not pushed to the wall inside of six years.

The rule is discharged.

M. Regan, Esq., for rule. *M. Cannon*, Esq., contra.

[Leg. Int., Vol. 31, p. 31.]

MORSE vs. GRITMANN, Assignee in Bankruptcy, etc.

An assignee in bankruptcy may appeal from an award of arbitrators under the compulsory arbitration law, without the payment of costs, the adverse party having taken out the rule of reference.

Rule to strike off appeal. Opinion delivered July 23, 1874, by

HARDING, P. J.—The only question here is, can an assignee in bankruptcy appeal from an award of arbitrators without the payment of costs?

The proviso to the 30th section of the compulsory arbitration law is in these words: "*Provided*, that in all cases in which executors, administrators, or other persons suing or sued in a representative capacity, or minors, shall be the party appellant from an award, the appeal shall be good, without the payment of costs, or entering in recognizance, as aforesaid, if such appellant shall not have taken out the rule of reference."

The rule of reference in this case was taken out by the plaintiff, the award was in his favor, the appeal by the assignee in bankruptcy was in time; and, with the exception of non-payment of costs, it was in strict conformity with the statute.

Under the general bankrupt law, an assignee in bankruptcy stands in a "representative capacity," and may sue and be sued in that relation. He is, therefore, within the protection of our statute, and may appeal from an award of arbitrators without the payment of costs. It is the character of the suit that determines this right: *Pugh vs. Ottenkirk*, 3 W. & S. 172.

The rule is discharged.

P. C. Gritmann, Esq., for rule. *George B. Kulp*, Esq., contra.

[Leg. Int., Vol. 31, p. 269.]

DAVENPORT vs. WILLIAMS.

On a judgment obtained in the Common Pleas, either by adversary action or by confession, which, without costs, shall not amount to more than one hundred dollars (the plaintiff not having previously filed the required affidavit), costs of execution will be allowed.

Opinion delivered by

CONYNGHAM, P. J.—Under the 26th section of the act of 1810, Purdon, 848, pl. 26, any person who obtains a judgment in the Common Pleas, “which, without costs, shall not amount to more than one hundred dollars,” not having previously filed the required affidavit, “shall not recover costs in such suit.” The court has jurisdiction of the case, and can allow the judgment; but the party having so limited a claim must pursue all the proceedings necessary to secure the judgment, under the penalty of payment of costs. The judgment for the debt, either obtained by adversary action or by confession, as in the present case, became regularly entered as a judgment of record in the Common Pleas, and must possess all the ordinary incidents of such an entry.

A party thereto becomes entitled to an execution in due season, in order to collect the debt, even though the judgment be upon a note, with confession, and is obtained or recovered within the meaning of the section above cited. The penalty becomes complete, and attached by the judgment. It does not accrue by reason of the non-payment of the same, or the use of further means for its collection, but plainly and technically applies only to the loss of what are commonly called the costs of a suit; what are usually termed execution costs, but in reality the fees of the officers upon an execution, are not, in our opinion, covered by the penalty. It is like the case of a judgment entered on a transcript: when a return of *nulla bona* is once filed, an execution thereafter will issue from the court with the full costs; the analogy, however, is more plain in appeals from justices, formerly entered, under the proviso to the 4th section of the justices’ act of 1810, 5 Sm. Lws., 163, now repealed, and those now entered under the 1st section of the act of 1833, Purdon, 860, pl. 90; in all which cases, if the plaintiff recovered any sum, though it did not carry costs, he could still collect his real judgment, with the costs of execution.

The debt in this case became a valid judgment by the defendant’s confession, and as he neglected to pay it, and compelled the party to resort to an execution, he must pay the incidental charges. He must be considered as knowing that it could at any time be entered in a judgment upon his neglect, and he must therefore abide the consequences.

The rule will be made absolute upon the payment of debt, interest and execution costs.

[Leg. Int., Vol. 31, p. 269.]

STRONG *et al.* vs. O'DONNELL.

1. Shares of national bank stock are personal property.
2. Those belonging to non-residents are separated by the acts of Congress from the persons of their owners for purposes of taxation, and are to be taxed at the place where the bank is located.
3. The States may direct the manner and place of taxing the shares of resident owners, and the Legislature of Pennsylvania not having separated such shares from the person of their owner, their *situs*, like that of other personal property, is at the domicile of their owner, and they are to be taxed in the town or city where he resides, not in that where the bank is located.
4. To avoid multiplicity of suits, the court has jurisdiction to enjoin against the collection of an illegal and unauthorized tax.

In equity. Motion to dissolve preliminary injunction. Opinion delivered by

DANA, J.—The bill was originally filed against the present defendant, O'Donnell, and also against the borough of Pittston, the poor district of Pittston borough, and Pittston borough school district, three municipal bodies, distinct in organization and differing in territorial extent.

The poor district to which Pittston borough belongs is composed of the borough and township of Pittston, the township of Jenkins, the borough of Pleasant Valley, and the townships of Lackawanna and of Old Forge. The corporate name of the district is, "the directors of the poor of Jenkins township, Pittston borough, and Pittston township."

This bill was amended by striking out all the defendants except James O'Donnell, and conforming the designation of the poor district, where it occurs in the statement of the complaint, to its true corporate name.

The averments of the amended as well as of the original bill are substantially: That the plaintiffs are residents of the borough of West Pittston, and not of the borough of Pittston; that they are owners of certain shares of the capital stock of the First National Bank of Pittston, located in the borough of Pittston; that the three corporations above named have severally assessed their shares of stock with taxes for borough, poor, and school purposes for the year 1873, and placed duplicates for the same, with warrants attached, in the hands of the defendant, James O'Donnell, their receiver of taxes; who has levied upon certain shares of said stock, and threatens, if the taxes are not paid, to enforce their collection by sale.

The plaintiffs, being residents of the State and county, claim that the taxation of their stock by the authorities of the borough in which the bank is located, but in which the plaintiffs do not reside, is without authority of law, and they pray that the defendant be enjoined against the collection of such taxes.

The question for decision is, where should shares of the capital stock of a national bank belonging to persons residing in the same county, but not in the same town where the bank is, be taxed?

The plaintiffs claim that such shares should be included in the valuation of their other personal property, and taxed where they reside. The defendants, on the other hand, contend that they should be taxed where the bank is located.

Objection is also taken by the defendant to the jurisdiction of the court to restrain by injunction the collection of a tax merely upon the ground that it is illegally assessed.

The United States bank act of 3d of June, 1864, and the explanatory act of 10th February, 1868, left it to the Legislature of each State to determine and direct the manner and place of taxing shares of national bank stock located within the State, subject to certain limitations as to the rate of assessment, unimportant in the present controversy. The former act permitted them to be included in the valuation of the personal property of the stockholder, in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere. The latter act, that of 1868, declares that the words in the act of 1864, "the place where the bank is located, and not elsewhere," shall be "held to mean the State within which the bank is located;" and further provides, that the shares "owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere;" U. S. Statutes at Large, 40th Cong., p. 34.

In some of the States, as in Illinois, the place where national bank shares of resident owners are taxable has been defined by statute. In Pennsylvania there is no direct enactment, at least none has been cited upon the subject; and the place of their taxation is left to be determined from the nature and incidents of this species of property, and such general laws as may be applicable.

They are, in the 12th section of the act of 1864, under which these banks are organized, made in express terms personal property. They are distinct from the real estate of the association, which, in the third proviso to the 41st section of the act of 1864, is subjected to State, county and municipal taxation, and, of course, in the town where it is located. The stockholders' ownership of shares is distinct and different from the corporation's ownership of its capital. The corporation is the legal owner of all the property of the bank, both real and personal, and within the powers conferred upon it, and in furtherance of the purposes for which it was created, can deal with it as a private individual can deal with his property. The interest of a shareholder entitles him to a due proportion of the net profits earned by the bank while it exists, and to a like proportion of the property that remains after its dissolution. This distinct, independent interest, right or property of the stockholder, the act of Congress has left subject to taxation by the States. A tax on the shares is not a tax on the capital of the bank. It is irrespective of, and not diminished or affected by, the amount of capital which the bank may have invested in non-taxable bonds of the United States: *Van Allen vs. Nolan et al.*, Supreme Court United States, 5th Am. L. Reg. (new series) 609, 613, 614.

Shares are thus expressly made personal property. The interest of the shareholder is in a measure incorporeal, intangible, a right pertinent to the owner rather than a tangible substance capable of a *situs* of its own. And whilst it may be, and in some States has been, separated from the owner by legislative enactment, as is done by the act of Congress in the case of non-resident owners, and made taxable at the locality of the bank, yet in the absence of any legislative separation, its *situs*, under the principles of law applicable to such property, would seem to be at the

residence of the owner. It is so far distinct from the capital, the real and personal property of the bank, that it is in no degree localized by or drawn to it, and as a necessary alternative attaches itself to the person, and follows the domicile of the resident owner. In *McKeen vs. The County of Northampton*, 13 Wr. 519-525, Judge, now Chief Justice, Agnew remarks, that the interest which an owner of shares has in the stock of a corporation is personal; whithersoever he goes it goes with him, and when he dies his domicile governs its succession. The same doctrine is reiterated and applied by the same learned judge in *Markoe vs. Hartranft*, 6 Am. Leg. Reg. 487-8-9, a case which involved the ownership and taxation of national bank shares.

These shares, under the provisions of the act of Congress of 1864, are to be included for assessment and taxation in the valuation of the personal property of the owner, and the president and cashier of the bank are required to keep a list of the names and places of residence of the shareholders for inspection by the assessors of taxes.

The 2d section of our State act of 12th of April, 1867, P. D. 142, § 87, having primarily in view the assessment of a State tax, authorizes and directs the appointment of assessors "to ascertain the residence and assess the value of the shares of stock," who are to obtain from the bank officers a full list of shareholders, with their residence, and assess all those within the county or district for which he is appointed; to make a list of the same, and the amount of taxes due to the Commonwealth, and to return such list to the commissioners of the city or county in which the bank is located. The third section of the supplementary act of 2d April, 1868, P. D. 143, § 92, after enumerating the duties of the assessor, requires him to state "whether the stockholder be resident or non-resident of the county in which the bank is located." Then follows the act of 31st March, 1870, P. D. 143, § 96, the first which refers in express terms to the taxation of bank shares for county, school and municipal purposes, although they were in fact liable under previous legislation: *Everett vs. Steele*, 1 Leg. Gaz. R. 470; 1 Luz. Leg. Reg. 621; 21 Sm. 216.

In these several enactments we see no severance of the common law tie which connects this species of property with the person and domicile of the owner. To require, as is studiously done, a statement by the assessor of the place of residence of shareholders living within the State would seem to be unnecessary if the shares are to be taxed where the bank is situated, without regard to the owner's residence. It was not simply and only to avoid double taxation.

Since the argument of the present motion our attention has been called to the recent decision of the Supreme Court of the United States in the case of *Tuppan vs. The Merchants' National Bank of Chicago*, reported in the Luzerne Legal Register, vol. 3, p. 73. That arose on appeal from the United States Circuit Court of the Northern District of Illinois.

The Legislature of Illinois, in 1867, having in view the decisions of the courts, that to reach the taxation of national bank shares the tax must, under the act of Congress, be levied upon the individual shareholders: 3 Wallace, 573; 4 Ib. 459, passed an act requiring the taxes to be assessed upon the individual shareholders "in the county, town or dis-

trict where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such county, town or district, or not:" see quotation of the act in the opinion of M'Callister, J., in *National Bank of Mendota vs. Collector of Mendota*, Legal Opinion, March 3, 1873. The question in *Tappan vs. The Bank of Chicago* was, whether the General Assembly of Illinois could provide for the taxation of the owners of shares of a national bank in that State at the place within the State where the bank was located, without regard to their places of residence. It was claimed that under the Constitution of the State, the Legislature could not separate personal property or a bank share, within the State, from the person of the owner. The decision of the court, expressed in the able opinion of the chief justice, is, that the Legislature, for purposes of taxation, can thus separate them, and that it is not restrained by the State Constitution from taxing the shares at the place where the bank is located, instead of at the residence of the owner. The United States law of 1868 thus separated the shares of non-residents. In Pennsylvania, however, there is no such act as that of Illinois; no legislative separation has been made, and the foregoing decision is therefore not applicable in this case.

Our conclusion, then, is, that the taxes complained of in the bill are unauthorized; that the shares of resident owners should be assessed "for borough purposes, with school and building taxes, and with poor taxes," in the town or district in which the owner resides. Such, we are informed, has heretofore been the manner in this county of taxing shares of bridge stock and of stock in ferries. In this way there is a fair distribution of the revenue raised through the several districts where the stockholders reside; by the other method, the whole amount is absorbed in the town where the bank or banks, if more than one, happen to be located.

If the taxes be without authority, has the court jurisdiction to enjoin against their collection? We are of the opinion that it has. The case, in our view, is one of void authority, not of irregularity in the exercise of lawful authority, or of a mere discretion. The complaint is not against the rate of assessment, or any irregularities susceptible of correction on appeal, but against the act of assessing at all at the place and by the parties making it. A number of shareholders are interested; to turn them over to their legal remedies would lead to a multiplicity of suits, and such a case forms an exception to the general rule that equity will not relieve against an erroneous or even an illegal assessment: *Dows vs. The City of Chicago*, 11 Wall. 108.

To turning over the plaintiffs and other shareholders to their action of damages against the defendant, a public officer, we adopt, as a further answer, the language of Judge Woodward, in *Miller et al. vs. Gorman*, 2 Wright, 313: "The redress in damages, if obtained, would be inadequate, and such actions would defeat the due administration of a public office. One of the great purposes of equity jurisdiction is to prevent circuity of action and exclude unnecessary litigation. Preventive justice, when carefully administered, is the cheapest and best of all kinds of justice. Especially is it the best for erring public officers."

The question raised in this case will doubtless be carried to the Supreme Court. Its early settlement before delay, costs, and damages

have accrued, is important to all parties. Our disposition of the present motion will place the matter in shape for an appeal.

The motion to dissolve is overruled, and the injunction heretofore awarded is continued until otherwise ordered.

A. T. McIntock and H. M. Hoyt, Esqs., for plaintiffs.

E. P. Darling, D. S. Koon, and C. S. Stark, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 300.]

In the matter of the Contested Election of ALBERT P. BARBER, to the Office of Prothonotary of the County of Luzerne.

1. When a complaint in a contested election proceeding is in due form upon its face, it is the duty of the court to take jurisdiction, and to make such orders and decrees as will speed the investigation. When, however, the prerequisites necessary to confer jurisdiction have not been complied with, as shown by the face of the complainant itself, the proceeding will not be entertained, but, on the contrary, it will be dismissed at once.
2. A proceeding to contest an election, is in the nature of an appeal by the people to the court from an undue election or false return. The act of assembly authorizing it, is remedial in its character, and should be construed liberally, and for the advancement of the remedy.
3. Where a complaint contesting an election to the office of prothonotary, purporting on its face to be signed by thirty qualified electors, two of whom have vouched its correctness under oath, has been filed in the proper office; and subsequently it is found that one of the thirty complainants, though a well-known citizen, did not at the time he attached his signature, possess all the qualifications of an elector, the court will not, for this reason alone, dismiss the complaint; but, if the case be a proper one, will, in the exercise of a sound discretion, permit it to be amended by allowing the name of another person possessing all the qualifications of an elector, to be attached thereto, accompanied by appropriate vouching; and, thus, bring the proceeding not only within the letter, but within the spirit and purpose of the law.
4. The election laws were enacted to be observed, not to be set at naught. They are mandatory, not directory. When the terms of a statute are absolute, explicit and peremptory, no discretion is given, and when penalties, sharp and severe, are imposed against the violation of its respective terms, they have the effect of negative words, and render its observance imperative.
5. The act of July 2, 1839, and the act of April 17, 1869, contemplate that nothing less than a *record* shall be kept of the manner in which the right of the elective franchise has been exercised. The former requires that it shall consist of a list of voters, tally-papers, certificates of the oaths taken and subscribed by the inspectors, judges and clerks; and, in addition to these, the latter requires that it shall consist of the affidavit of a witness together with the affidavit of every person voting, whose name appears on the list of voters, but not on the registry list. This record is to be filed in the proper office, and "be subject to examination."
6. Whenever, therefore, a record thus made up and filed, exhibits on its face that the officers conducting the election have negligently, recklessly, and in violation of their sworn obligations, disregarded the plain mandates of the law, no favorable presumption whatever attaches to their return. On the contrary, being thus *false upon its face*, there can exist in connection with it no peculiar or indescribable *sinctity* which will exempt it from the same untoward presumption attaching always to every record of official misdoing.
7. In adjudicating, however, upon a contested election, it is the duty of a court, whenever the possibility to do so exists, to see that every legal vote cast be counted, not thrown away. And it is only when the whole proceedings connected with the election at any poll, whether shown by the face of the papers, or, *aliunde*, are so tarnished by the fraudulent, or criminally negligent conduct of the officers, as to be altogether unreliable, that a court will be warranted in casting out wholly the return of such poll from the general count.
8. But human laws can never be so constructed that courts can render perfect justice under all circumstances. Occasions will arise when approximate justice is all that

can be administered. When, therefore, legal and illegal votes have been counted indiscriminately, and a majority has resulted in various districts embraced in the general return, whether for one candidate or the other, the only means whereby even approximate justice can be reached, is to require him for whose advantage such majority districts enure, to lift the curse which the law has imposed upon the illegal ballots, otherwise they will be deducted from his count.

9. The doctrine in *Duffy's Case*, 4 Brew. 531, 2 Luz. Leg. Reg. 49, reasserted.

Opinion delivered September 14, 1874, by

HARDING, P. J.—In the matter of the contested election of Albert P. Barber, to the office of prothonotary for the county of Luzerne.

The return judges of the election held on the fourteenth day of October, 1873, in the several cities, townships, boroughs, wards and districts in the county of Luzerne, met on the seventeenth day of the same month, at the place appointed by law, and, *inter alia*, certified that Albert P. Barber received eight thousand and sixty votes for the office of prothonotary, and that Samuel W. Trimmer received seven thousand six hundred and seventy-eight votes for the same office.

On the following twenty-fourth day of October, the complaint in writing of thirty *citizens*, duly vouched by the oaths of two of their number, was filed in the proper office, setting forth that they were qualified electors of the county; and further, that there had been an undue election or return of Albert P. Barber to the office of prothonotary; because, as the complainants alleged, he received not more than seven thousand five hundred and eighty-eight votes for the office, while Samuel W. Trimmer, an opposing candidate, received eight thousand and twenty-two votes for the same office, and was, therefore, elected by a majority of four hundred and thirty-four votes.

There were twenty-four specifications contained in the complaint, charging irregularities and frauds on the part of the election officers in as many election districts, such, in some of the districts, as wilful and corrupt disregard of the requirements of the election law; the use of illegal and incorrect registers, and the receiving of votes from persons thus illegally and incorrectly registered; knowingly permitting persons not duly registered, persons not registered at all, persons not of legal age, persons not legally qualified by residence in the respective districts, or by payment of taxes, to deposit their ballots without challenge or requiring proof of their right to vote; neglecting and refusing to prepare duplicate returns, tally-lists, lists of voters and other papers, and to file and deposit the same in the proper office, as the law requires; in other of the districts, charging not only similar irregularities and frauds, but the further official misconduct of permitting aliens to deposit their ballots; receiving votes from naturalized citizens who had not voted for ten consecutive years previously in the respective districts without requiring the production of certificates of naturalization and indorsing the same; receiving and counting the votes of persons who were not registered without requiring for preservation and filing in the proper office, the proof of their right to vote, and without adding their names to the list of taxables and to the list of voters as the law directs; fraudulently altering, changing and falsifying returns; corruptly conspiring with, and inducing evil-disposed persons to destroy true returns and substitute false ones in their stead; stuffing ballot-boxes and counting

the ballots afterwards; and again, abstracting from the boxes ballots lawfully polled and refusing to count them; usurping official positions on the election boards; appointing ineligible persons to act as inspectors and clerks; by reason of which manifold irregularities, and wicked, fraudulent, and corrupt practices, as alleged in the complaint, the return of Albert P. Barber, as elected to the office of prothonotary, was undue and false, and that, in truth, Samuel W. Trimmer was lawfully elected to the said office by a majority as before stated, and should have been so returned. A prayer was appended, asking the court to make such orders and decrees as would afford the complainants an opportunity to exhibit the truth of their allegations, to the end that adjudication might be had in the premises conformably to law.

On the day following the filing of the complaint, the usual orders were made in the case, and Saturday, November 8, then next, but subsequently, December 6 following, was appointed as the day for receiving the answer of the respondent.

On the 28th of October, 1873, the complainants, by their counsel, asked leave to amend the complaint by adding eighty-eight other specifications, charging, to some extent, the same irregularities, frauds and corrupt practices in other election districts within the county, as were contained in the original complaint. These additional specifications were at that time simply filed, without further order of the court in respect to them.

On the 3d of November, 1873, D. R. Randall, Esq., of counsel for the complainants, came into court and presented an affidavit, setting out substantially, that when he, as attorney for the complainants, filed the petition in the case, he supposed that the names of thirty qualified electors were attached to the petition; but that, by mistake, two of the persons were not qualified electors by reason of not having paid a State or county tax within two years immediately preceding the election. Leave was therefore asked to further amend the complaint by adding the names of James W. Rhoades, Peter Pursel, and David S. Koon, who were conceded to be qualified electors at the time of holding the election, and also at the time of filing the complaint. In response to this application, we granted a rule to show cause why the amendment, as asked for, should not be made, and fixed Saturday, November 8, 1873, as the day for hearing and disposing of the same.

On the day of granting this rule, General E. S. Osborne, of counsel for the respondent, appeared and excepted to the petition or complaint, as follows:

First. That specification numbered one, is indefinite and vague, in that it does not allege that any illegal votes were received and counted for the respondent, nor that the result of the election was affected by the illegal conduct charged upon the officers holding the election.

Second. That specifications numbered two, three, twelve, twenty-four and twenty-five, are indefinite and vague, and do not allege how many illegal votes were received and counted for the respondent in the several districts named, nor that thereby the result of the election was affected.

Third. That specifications numbered from twenty-five to one hundred

and twelve, both inclusive, are not signed by the petitioners, or any of them, nor are they verified by the affidavits of any person.

Fourth. That the petition is not signed by thirty qualified electors of the county of Luzerne; of the names of persons attached to it, there are not thirty who were at the date of the election, or now are, qualified electors of the county of Luzerne.

Fifth. That the petition is not the petition of the persons whose names are attached thereto, because their signatures were obtained by misrepresentations and without an inspection or knowledge of the contents of the petition.

Upon filing these exceptions, and on motion of counsel, we granted a rule to show cause why specifications numbered one, two, three, twelve, twenty-four, twenty-five to one hundred and twelve, inclusive, should not be stricken out; and also why the petition or complaint should not be quashed, making the rule returnable on the 8th of November, 1873. Depositions were taken in connection with the several rules granted in the case. On the day appointed for the hearing and before the argument, counsel for complainants asked leave to withdraw the amended specifications previously filed, and to add others in their stead, numbering from twenty-five to fifty-six, both inclusive, containing charges analogous to those already recited, and involving other election districts within the county. After full argument on the one side and the other, we overruled the exceptions. We permitted the complaint to be amended, as prayed for, directing, however, that the amended specifications be signed by the complainants and vouched by the requisite affidavits, and that a copy be duly served on the respondent. The time for filing the answer of the respondent was extended to December 1, 1873, at ten o'clock A. M., though subsequently a further extension was allowed until December 6 following.

To the judgment of the court on the several rules, the counsel for the respondent excepted, and requested that we would reduce to writing our opinion, and file the same of record.

So far as relates to the first and second exceptions, we have to say that, although the specifications do not in so many words set out that any illegal votes were received and counted for the respondent, nor that the illegal conduct of the election officers in the districts named, affected or changed the result of the election, yet there is contained in each specification a distinct and positive charge, that, for the causes therein recited at length, the election in these districts was unlawful, fraudulent, and void, and the returns false and untrue. Now, the number of votes returned as having been polled for the respondent in these districts, is largely in excess of those polled for Samuel W. Trimmer; hence, if these returns, together with others contained in the specifications not excepted to, be untrue, then, unquestionably, they must affect the result of the election, and any further or more explicit statement of the fact could hardly be necessary. Was the election in these particular districts fraudulent and void? Were these returns false and untrue? These are the very questions sought to be determined by this proceeding, under the law and the evidence.

With regard to the third exception, if it be recognized that any amendment of a complaint contesting an election can be made at all,

then we see no difficulty in permitting the petitioners, under the orders of the court, such as shown upon the record, to add whatever pertinent specifications to their complaint that, under the advice of counsel, might be regarded as essential to a full showing and determination of the case upon its merits.

Passing in this immediate connection the fourth exception, we are of opinion that the fifth is grounded in that sort of technicality, which, though recognizable in the early days of contests of this character, was long since swept away effectually and forever. The necessities of the times, the mandate of repeated legislative enactment and intendment ultimately induced a clearer and broader appreciation of judicial power and duty in these cases. In *Duffy's Case*, reported in 4 Brew. 531, we said, substantially, that throughout the wide field of judicial duty, there was, perhaps, no feature from which judges drew away so irresistibly, nor one so delicate, as that arising out of contests of this character; that, unlike every species of litigation where the questions involved might be discussed and determined purely upon the merits and legal aspects presented, without incurring the suspicion of bias from any quarter, yet under our system of government, where the officer of to-day might, through the exercise of the popular will, be supplanted by the choice of to-morrow, a partisan feeling was engendered, which, besides being blind to inductions founded upon established law and indisputable right, was intolerant of everything standing in the way of positive success; that, for a time after the passage of the act of July 2, 1839, imposing this jurisdiction upon the courts, thus constituting them, as it were, umpires between contestants for popular favor at the ballot-box, judges shrank from coming up to the full measure of their responsibilities under that act; and, as a consequence, the proceedings in the earlier contests were characterized from their inception to their conclusion, as much by what now would be denominated mere technicalities as by any consideration of the merits. We pointed to the further fact that, notwithstanding the provisions of the act of July 2, 1839, bore unmistakable evidence of a legislative determination to provide a means whereby the exercise of the elective franchise by the honest citizens of the Commonwealth possessing the qualifications of electors, might be protected and secured against the machinations of trained villains, and the ballot-box, when fouled, either through fraud, or from negligence, or incapacity, might be cleaned of impurities, yet, that from a somewhat chronological review of the rulings of the courts in contested election cases as they had subsequently arisen, the noticeable fact stood out clearly, that it had taken a long period of years for the local judiciary of the Commonwealth to come up fully to the point of legislative intendment in this business. We showed, however, that the latter decisions exhibited a line of adjudication in full conformity with the original and declared purposes of the law, and that the "*merits*" were not to be hidden, even though mazes of technicality had been pleaded to the approach.

Now, the gravamen of the fifth exception is, that the persons whose names were attached to the complaint were deceived, that their signatures were obtained by misrepresentation, and that they neither inspected, nor had knowledge of the contents of the complaint. If such had been shown to be the fact, under the evidence taken, we should have sus-

tained the exceptions and dismissed the complaint at once; but the contrary appears to have been the truth in the premises. Of the whole number of persons signing it, except two who are embraced in a much graver exception, five have been examined under oath touching their connection with it. Richard Tener swears that he was aware at the time of signing the petition, that its purpose was to contest the election; W. E. Whyte says substantially the same thing, and so does Jacob Kocher, John Wurzburger, and Anthony Vogt. True, they did not read it; it was too long perhaps to be read or listened to by business men in business hours and business places; too long to be read or listened to by anybody, except possibly by lawyers and judges; but its contents and its purpose were explained to them, and they affixed their signatures understandingly. It is not, therefore, a different paper from what they supposed; on the contrary, it is the same paper; it is not being used for a purpose different from that which was explained to them; on the contrary, it is being used for the same purpose; it is not a paper which they repudiate even now; on the contrary, for all that is contained in their testimony, they desire to be regarded yet as contestants of this election.

To recur now to the fourth exception: That the complaint was not signed by thirty *qualified* electors at the time it was filed, is conceded. Indeed, from the affidavit of the counsel who prepared it, that fact is first brought to our notice. Thirty reputable and well-known *citizens* of the county attached their signatures to this complaint, and two of their number verified its correctness by proper affidavits; yet, so it is, that but twenty-eight, at most but twenty-nine, of the thirty, were qualified *electors*. How did this occur? The counsel bears his testimony that it occurred purely through mistake. When we consider the surroundings, the circumstances and facts which are urged, *arguendo*, in mitigation of the mistake—facts and circumstances, we may say, conceded to have existed, we are not entirely clear as to the construction to be put upon it. The complaint charges the perpetration of the very grossest outrages upon the elective franchise in this county; it specifies with sufficient precision the frauds, irregularities, and corrupt practices which were committed, and it locates them; it was verified properly and filed in time; in the main, it was in conformity with law and established practice. Apart from the single mistake referred to, it was substantially correct; upon its face, *it was actually so*; and hence, it was our duty under the statute to take jurisdiction in the case. But, however this may have been, it is contended that when the fact was established that jurisdiction had been both mistakenly invoked and exercised, then the complaint should have been dismissed.

Here was raised indeed an important question.

In the absence of any precedent adjudication directly upon the point, we ruled it, as we conceive, in conformity with the general spirit and tendency of judicial decision upon analogous subjects. We take occasion to say in this connection, however, that it is a matter of great satisfaction on our part that our judgment in this particular may be reviewed by the Supreme Court, and that the error, if it be one, may thus be corrected.

Now, what are the facts which have been pleaded in extenuation of the mistake under consideration, and what the grounds upon which the

propriety of permitting the amendment is predicated? O. K. Moore and D. C. Cooley are among the original signers of the complaint. They are both citizens of the county, and have been for many years. The former has been a prominent business man, widely known throughout the county; and, at the very election out of which this contest has arisen, he was the regularly nominated and accepted candidate of one of the great political parties for member of the general assembly; the latter has been for ten years a practising attorney at this bar, in good standing and generally known, not only here but all over the county. Besides Mr. Moore testified that, while he did not vote at the election in October, 1873—though a candidate then himself—nevertheless he had paid a State or county tax within two years preceding that election, and that the tax had been assessed within the proper time. It was paid not in Luzerne county, it is true, but in Northampton. Mr. Cooley testified that he, also, did not vote at the election referred to, though he had been a resident here since 1864. He says he had not paid a State or county tax within two years prior to that election, and that none had been assessed against him, owing, perhaps, to a change of residence from one ward to another.

Is it strange, then, or does it exhibit any want of ordinary or professional care on the part of Mr. Randall, when he was preparing this complaint, that he should have sought the signatures of Mr. Moore and Mr. Cooley? That they were citizens, he, in common with all of us, well knew; that they were qualified electors, he, in common with all of us, most naturally would presume. Shall it be adjudged, then, as cold, unbending law, that when a gentleman of the law prepares the necessary complaint to inaugurate in the courts a contested election proceeding, with a view to uncover a whole catalogue of frauds and irregularities, which are, in good faith, believed to have been perpetrated, he must examine the assessment books, the tax duplicates and tax collectors and receivers, not only in the county, but all over the State, lest, perchance, one of the requisite thirty contestants affixing his signature, shall subsequently be found not to have been a qualified elector just at the time that particular election occurred, or just at the time when the complaint must necessarily be filed? More than this: The payment of a State or county tax within two years, which shall have been assessed agreeably to the constitution and laws, is not by any means the only qualification of an elector; he must be a natural born citizen, or have been duly naturalized; he must be over the age of twenty-one years; he must have resided in the district ten days immediately preceding the election; his name must appear on the registry list, or if not, he must make proof of his qualifications before his vote can be taken; and so on.

Suppose, now, one of the thirty persons whose signatures have been attached to a complaint contesting an election, has been recognized, through mistake, by the board of election officers, as possessing the qualifications of an elector, and, accordingly, has been permitted to vote, shall the complaint, *though in form upon its face*, become the subject of judicial investigation in this particular, and be dismissed if the mistake be established? Must all this precedent examination and adjudication be had without even a tread upon the road leading towards the "merits"? Jurisdiction having already been rightfully invoked

and taken, is there still no sound discretion lodged in the court whereby a proper amendment may be permitted, and thus the triumph of possible wrong be averted? Surely in almost all other proceedings both in law and equity, and on the criminal side of the courts, amendments are of common occurrence. Indeed, the administration of justice would be sorely impeded, were such not the case. But it is argued, such amendments are the result either of express statutory provision or long established judicial recognition. Let us for a moment examine the statute under which this proceeding was instituted, and also the rulings of the Supreme Court upon it, so far as its provisions have been directly before that tribunal.

"The return of the elections, under this act, shall be subject to the inquiry, determination and judgment of the Court of Common Pleas of the proper county, upon complaint in writing of *thirty or more of the qualified electors* of the proper county of undue election or return of any such officer, two of whom shall take and subscribe an oath or affirmation that the facts set forth in such complaint are true to the best of their knowledge and belief and the said court shall hear and determine such contested election at the next term after the election shall have been held," etc.

We shall not go into any extended review or discussion of the rules applicable to the interpretation or construction of the statutes; it is enough to say that there are maxims upon the subject which have had judicial observance almost for centuries past. We shall, on the contrary, confine our observations strictly to the decisions of the Supreme Court of this State in connection with proceedings under this particular statute, and upon questions having direct analogies with the one before us.

In *The Bank of North America vs. Fitzsimons*, 3 Binn. 356, a case involving the construction of the statute, Chief Justice Tilghman said, that "As to the construction of statutes it is certain that they are not always to be construed according to the letter." In *Ward vs. Stevenson*, 3 H. 21, where the question of amendment—statutory, it is true—was before the court, Judge Rogers said: "The design is to prevent a party from being turned out of court by the error of his counsel, and when that error may be corrected without injury to a single human being, why should it not be done? The court, of course, will confine the remedy to a clear mistake, and will not suffer it to be perverted." In *Trego vs. Lewis*, 8 P. F. S. 463, where the same question was involved, it was said that the courts should keep pace with legislative reform instead of lagging in its rear; "and that amendments which tend only to advance the interests of justice are not only proper but necessary, and should be allowed." And in *The Schuylkill Navigation Company vs. Loose*, 7 H. 18, the doctrine was laid down in the following language: "Acts that give a remedy for a wrong are to be taken equitably, and the words shall be extended or restrained according to reason and justice, and according to their end." In *Election Cases*, 15 P. F. S. 20, where some of the provisions of the statute in question were before the court, Judge Agnew, now Chief Justice, said that "The object of the law is to give the people a remedy. It is their appeal from the election board to the court from an undue election or false return. The law is therefore remedial, and to be construed to advance the remedy."

This was tersely reasserting not only the doctrine of the earlier cases in our reports relating to the construction of remedial statutes, but it was in full accord with English adjudication upon the same subject. In *Dwarris on Statutes*, § 718, it is said that "A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally."

Now it will be observed that while the section of the act already quoted in part, contains several legislative mandates, there are but two really to be considered in support and explanation of the ruling upon the fourth exception. One of them we here repeat: "And the said court shall hear and determine such contested election at the next term after the election shall have been held." In the election cases before referred to it was decided that this feature of the statute was merely directory, and that jurisdiction did not fall with the expiration of the term.

The other mandate we also repeat: "The return of the election, under this act, shall be subject to the inquiry, determination and judgment of the Court of Common Pleas of the proper county upon complaint in writing of thirty or more of the qualified electors of the proper county," etc. Here, then, are two mandates, couched in equally positive terms, proceeding from the same superior authority, indeed embraced in a single section of the same statute, giving a remedy outside of the common law altogether, and providing not only the *manner* in which it shall be pursued, but the *time* also in which it shall receive judicial determination! It is argued, however, that they enjoin duties unlike in their character, the one being ministerial, the other judicial. This is very true, but considering them *just as they are*—legislative commands—is the one a whit stronger to the practitioner who prepares a complaint than the other to the judge who tries it? But what injury could befall any human being if, in a proper case, in the exercise of a reasonable discretion, the court should construe both mandates, *the one as well as the other*, so that the remedial end in view might be carried into effect?

Upon the point as to whether jurisdiction fell with the term or not, Judge Agnew in the election cases said: "The court cannot 'proceed on the merits' of the contest without time to take the testimony and to hear and decide. If the testimony be voluminous the merits cannot be reached without time, nor can the merits be reached if delayed by dilatory motions. The act of 1810 requires *certiorari* to justices of the peace to be decided 'at the term to which the proceedings are returnable.' Yet what lawyer ever heard that a *certiorari* fell with the expiration of the term? It would be a mockery of justice were the people told, when seeking redress against dishonest servants, that the voice of the judge is silenced in the midst of his sentence, or the uplifted arm of the law struck down by the stroke of the clock."

Again, with respect to the power lodged in the Courts of Common Pleas, of permitting amendments in these cases—not, it is true, the same character of amendments embraced in the fourth exception—the same distinguished judge said: "And in point of reason why should the court not have power to amend in a contested election case? It is a

judicial remedy and concerns important rights. On what ground should the cause of the people be held so strictly that a mere specification of facts, within the same general complaint, relating to the same contest and the same returns, could not be allowed in order to reach the very 'merits' the court is ordered to try?" This reasoning is eminently sound and pertinent. There is hardly a lawyer or judge within the Commonwealth who would attempt to controvert it.

The true theory would then seem to be that this important piece of remedial legislation is to be construed liberally, and that the whole matter connected with the administration of it, is to be left to the sound discretion of the several Courts of Common Pleas. The mandate to hear and determine "at the next term," though positive, would, as has been clearly shown, even under ordinary circumstances, defeat the very object of the law; the mandate that a complaint must contain the signature of "thirty qualified electors," though no more positive than the other, but construed to be never amendable, even to the extent sought here, and under the circumstances here presented, would also defeat the very object of the law. The purpose of the two mandates being therefore common, their affinity being close, they should, in our judgment, be construed *ut res magis valeat quam pereat*,—that the greater end may be carried into effect rather than fall to the ground.

In conclusion upon this point we say, it is not controverted that the complaint was prepared and presented in good faith. If it had been upon its face otherwise than correct the court would have declined to take jurisdiction; but, as we have shown, it was, *prima facie*, correct, and therefore we rightfully took jurisdiction. When was that jurisdiction lost? Was it lost when, in the exercise of a supposed "sound discretion," we permitted an amendment which brought the proceeding within the strict letter of the law, to say nothing of its spirit and purpose?

The exceptions having been overruled for the reasons stated, and a copy of the amended complaint having been served as directed by the court, the respondent, reserving all his rights under the exceptions, on the 6th of December, 1873, filed his answer; in which he denied generally all the charges contained in the complaint, but especially those embraced in the thirteenth, fourteenth, fifteenth, sixteenth and seventeenth specifications, relating to the Third, Fourth, Fifth, Sixth and Seventh wards of the city of Scranton, respectively, and to those embraced in the twenty-first and twenty-second specifications relating to the Second and Third districts of the Twelfth ward of the same city. As a part of his answer he also charged gross irregularities upon the officers conducting the elections in *fifty-five* other election districts in the county; in some of them, not only were gross irregularities charged but fraudulent practices as well; besides, one district where the respondent received eighty-nine votes, and Samuel M. Trimmer one hundred and thirteen votes, was alleged to have been organized under an act of assembly in conflict with the Constitution of the State.

Taking the complaint on the one hand, and the answer on the other, and the startling fact is doubly charged that the election laws in the county of Luzerne, practically, amount to nothing. The former alleges the truth of this in *fifty-six* of the districts, where, in the aggregate, up-

wards of two thousand illegal votes are charged to have been received and counted for the respondent; the latter, though containing a stout denial of this *in toto*, nevertheless avers substantially that in fifty-five *other* districts upwards of fifteen hundred illegal votes were received and counted for Samuel W. Trimmer.

Upon the coming in of the answer, and on motion and nomination of counsel for the petitioners and the respondent, the court appointed David L. Patrick, Esq., commissioner, to take the testimony in the case. On the 20th of July, 1874, the testimony, covering a mass of manuscript, and filling a *closely printed volume of four hundred and twenty-three pages*, was filed. After full and able argument by counsel the case was submitted for our disposition on the 23d of July following. Considering the length of time that had already been consumed in taking the testimony, it was natural perhaps that a sharp anxiety for an almost immediate adjudication should have seized as well upon the public as upon the immediate friends of the parties more directly in interest. We dismissed, however, all concern upon this point because of the consciousness that no more time was being expended by us than was necessary for a thorough and careful examination of the whole matters involved.

We say now, at the outset of our investigation, that unlike ordinary cases coming before the courts where the litigants allege *much* on the respected sides, but succeed in proving *little* comparatively, there has been exhibited here an array of testimony which, in the main, establishes the charges set up on one side and the other. It is, indeed, a sad commentary upon the integrity and intelligence of the persons who officially conducted this election that in *one hundred and eleven districts* the election laws of the Commonwealth received but shameful observance. We have gone over the returns and accompanying papers in detail. The trail of heedlessness, incapacity and neglect covers them all. In some instances worse than this appears—the slimy finger of fraud and forgery has left its mark.

The election laws were enacted to be observed, not to be set at naught. They are not directory, but mandatory. When the terms of a statute are absolute, explicit and peremptory, no discretion is given; and when penalties, sharp and severe, are imposed against the violation of the respective terms, they have the effect of negative words and render its observance imperative. The whole statute-book is filled with enactments protective of individual right. It is indeed an inestimable blessing that this power of protection exists. But shall the power itself be without shelter? Shall the mainstay of our institutions be cut down? The purity of the ballot is the sheet-anchor of the government. When this is destroyed we drift into the sea of annihilation.

The necessity for further safeguards around the elective franchise was the parent of the act of April 17, 1869, as well as the later and more perfect act of January 30, 1874. It is with the provisions of the former, however, that we have now to deal. They contemplate that nothing less than a *record* should be kept of the manner in which the right of the elective franchise has been exercised. Their crowning purpose is, that the honest citizens of the Commonwealth possessing the qualifications of electors, and conforming to the reasonable and neces-

sary requisites whereby those qualifications may be surely indicated, shall vote; and that persons possessing neither citizenship nor shadow of qualification *shall not vote at all*; nor shall inattentive, careless, even innocent citizens, laggards; at least, until their right shall have been duly vouched. In this connection we repeat what was well said by an eminent jurist several years ago: The elective franchise, like other rights, is not that of unrestrained license. In a government of law the law must regulate the manner in which that right must be exercised.

The elector's privilege is not a mere constitutional abstraction, but it is to be exercised in subordination to law and on proof of title of the person claiming its exercise.

The record of every election is to be filed in the proper public offices of the respective counties, and be "subject to examination." Under the act of July 2, 1839, this record must consist of a list of voters, tally-papers, certificates of the oaths taken and subscribed by the inspectors, judges and clerks; and, in addition to these, under the act of April 17, 1869, it must consist of the affidavit of a witness, together with the affidavit of every person to whom the right to vote has been accorded and whose name appears on the list of voters, but not on the registry list already on file in the commissioner's office: "No man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote, as hereinafter required."

Suppose, now, it should be shown by the record itself, that this positive statutory mandate had not been observed, but on the contrary, that hundreds and thousands of votes had been received and counted in reckless disregard of its terms, what favorable presumption respecting that election ought to be entertained judicially, or otherwise? Again, if, upon the very face of the record, the fact should stand out that the inspectors, judges and clerks had been faithless in the discharge of their duties, careless of the interests intrusted to their charge, worse than this, unmindful of their sworn obligations, would it be urged that a court trying the "merits" of such an election, should pass unheeded official misdoing like this?

But to come to the record of the election in the identical case here. Right along in each precious bundle of documents which make it up, is found the oaths of two inspectors, reading severally thus: "I do swear that I will duly attend the ensuing election during the continuance thereof, as an inspector, and that I will not receive any ticket or vote from any person other than such as I shall firmly believe to be, according to the provisions of the Constitution, *and the laws of this Commonwealth*, entitled to vote at such election, *without requiring such evidence of the right to vote as is directed by law*, . . . but that I will in all things truly, impartially and faithfully perform my duties therein to the best of my judgment and abilities," etc. Then comes the equally solemn oath of the judge: "I do swear that I will, as judge, duly attend the ensuing election during the continuance thereof, and faithfully assist the inspectors in carrying on the same; that I will not give my consent that any vote or ticket shall be received from any person other than such as I firmly believe to be, according to the provisions of the Constitution and laws of this Commonwealth, entitled to vote at such election, *without requiring such evidence of the right to vote as is directed by law*, and that

I will use my best endeavors to prevent any fraud, deceit or abuse, in carrying on the same . . . and that I will make a true and perfect return of said election, and will in all things truly, impartially and faithfully perform my duty respecting the same, to the best of my judgment and abilities," etc. And lastly, out of the midst of this mess of recorded misdoing, drop the oaths of the two clerks, alike filled with the most solemn promises of the discharge of official duty, but no more entitled to legitimate regard than those of their fellow-officers.

Will it be urged by any reasonable lawyer in the land, that the return of an election wearing features like these carries with it any favorable presumptions whatever? The maxim "*omnia præsumuntur legitime facta donec probetur in contrarium*"—all things are presumed to be done legitimately until the contrary is proved—cannot apply to the doings of an election board, any further than it does to the record of a justice of the peace, which, *upon its face*, is all wrong. It would be worse than senseless, therefore, to hold that there was some peculiar or indescribable sanctity about an election return *false on its very face*, which exempted it from the same untoward presumption invariably attaching to every record of official misdoing.

Now the return of the election held in the Sixth ward of the city of Scranton has been produced before us. All the papers, including the oaths of the officers, the tally-list, the list of voters, the registry list—indeed everything connected with the record of that election, and on file in the proper offices, has been submitted. Upon the face of the papers themselves, the fact juts right out that the officers of that election board received and counted forty-five votes in a general poll of but one hundred and seven, from persons who had no right whatever, under the law, to vote. In the Seventh ward of the same city, the case is no better. Upon the face of the papers it is shown, that in a general poll of sixty-two, that board of election officers received and counted seventeen votes from persons who, likewise under the law, exhibited not a shadow of right to vote. And in the Second district of the Twelfth ward of Scranton, as appears also on the face of the papers, the election officers received and counted in a general poll of only two hundred and ninety-seven, one hundred and forty votes from persons whose names were not on the registry list, without requiring for preservation and filing in the proper office, a single affidavit vouching the right to vote. Besides this, we have to say, in respect to these three districts, that almost every essential requirement of the election laws is alike shown to have been ignored.

We mention, however, these three districts in this connection, not because the officers conducting the election in them are shown to have been any more reckless or criminal in the matter of receiving and counting illegal votes, than the officers conducting the election in most of the other *one hundred and eight* districts mentioned in the complaint and answer; but because the perpetration of other and graver outrages upon the elective franchise has been charged against these officers than any of the others. In the Sixth ward of the city of Scranton, for instance, the return shows that fifty-five votes were polled for the respondent, and fifty-two for Samuel W. Trimmer. The testimony of Patrick Mahan has been brought to our notice. He says: ". . . I was inspector of the Sixth ward polls . . . and was present at the counting

of the votes for prothonotary. Mr. Barber had *eight votes*; the whole Republican ticket had eight votes." At this point the tally-list and return seem to have been shown to the witness. He continues: "I cannot be positive how many votes Dr. Trimmer received, but I think he received *ninety-two*." Speaking of the return he says: "I am not positive that this is the paper; the signature, I think, is mine. . . . There are two changes on that paper that are not correct; the papers are not in the same condition as when I signed them; . . . the tally for prothonotary is not in the same condition as when it was signed by me; neither of the papers as to prothonotary . . . are as they were when they were signed by me; *they are not correct*." On cross-examination, he says: . . . "I am not positive the return was not signed until Thursday night; my clerk presented a paper to me, and said they wanted the return sheet signed, as the judge wanted to go to Wilkesbarre in the morning. I asked the alderman, who was my clerk, whether we had signed all the papers, and he said it was time enough; . . . there were no objections made about separating before signing the papers; I don't know that any reason was given for separating without signing the papers, except my clerk said there was time enough; I presume this paper is just as it was when I signed it; *I meant that the papers were not correct according to the votes actually counted*."

John Timlin sworn: "I am alderman of the Sixth ward of the city of Scranton. I was one of the clerks of the last October election at the Sixth ward poll." When asked how many votes there were polled for Barber, and how many for Trimmer for prothonotary on that day, his reply was: "I cannot positively swear just how many votes were polled for each, but to the best of my knowledge, Barber got only the regular republican vote, which was between *eight and ten votes*; I can't tell how many votes Trimmer got; I think Trimmer got between *ninety and a hundred votes*. If the vote returned in the prothonotary's office be fifty-five for Barber and fifty-two for Trimmer, I think the return must be incorrect."

Again, in the Seventh ward of Scranton, the return shows that the respondent received thirty votes, and Samuel W. Trimmer thirty-two votes for the office of prothonotary. John Biglin testifies thus: "I am a citizen of the Seventh ward, and was clerk of the election board. I was present when the vote for prothonotary was counted; I recorded the vote myself." When asked how many votes the respondent received, he said: "I believe he did not receive over *eleven*; fourteen votes were the highest any candidate received on the republican ticket; . . . it appeared in the *Scranton Times* the next morning, just as I and the other clerk recorded it." The tally-list and the return were shown to the witness; whereupon he said: "*I do not think the signatures written to them are mine*."

Finally, the return of the second district of the Twelfth ward of Scranton, shows that the respondent received one hundred and fourteen votes at that poll, and Samuel W. Trimmer one hundred and twelve. Thomas P. Brown, having been sworn as a witness, testified as follows: "I was judge of the election in the second district of the Twelfth ward of the city of Scranton last October election." When asked how many votes were polled for the respondent, he replied: "I think it run

between *seventy-four* and *eighty-four* votes for Barber; I believe that about *one hundred and seventy* or *one hundred and seventy odd* were polled for Trimmer there, that day," etc. As to the return on file, he said: "If the return as filed in the prothonotary's office should show that Barber received one hundred and fourteen votes, and Trimmer one hundred and twelve, and Daniel Bergan seventy-six, I should then say that the clerks made a mistake, *and that the return was incorrect.*"

With reference to the manner in which the election was generally conducted at that poll, we quote portions of the testimony of Daniel Sullivan, one of the inspectors. He says: "I didn't see one's naturalization papers there that day. One person was challenged for age, and the person challenging him told him to vote, as he knew he was of age. I don't remember but the one challenge on any ground, . . . I didn't see any person required to produce a tax-receipt that day; *the vote of every person who offered to vote was received, as far as I know.*"

The 74th section of the act of July 2, 1839, provides as follows: "As soon as the election hall be finished, the tickets, lists of taxables, one of the lists of voters, the tally-papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges and clerks, shall all be carefully collected and deposited in one or more of the ballot-boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election; and together with the remaining ballot-boxes shall, within one day thereafter, be delivered by one of the inspectors to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents, to answer the call of any persons or tribunal authorized to try the merits of such election," etc.

Now, on Saturday, the 25th of October, 1873, an affidavit was presented on behalf of the complainants, to the court, setting forth that for reasons therein stated, apprehensions were entertained that the ballot-boxes in the Sixth, Seventh and Twelfth wards of Scranton, containing the tickets and other documents referred to in the statute, would be destroyed. A prayer was added that the court would make such order in the premises as might seem meet and proper. Accordingly, we ordered that these boxes should be delivered forthwith into the custody of the prothonotary. On Sunday night following, and before this order could be carried into effect, the very outrage that had been anticipated was perpetrated upon the boxes. The history of its accomplishment is best told by the witnesses. Thomas D. Kelly sworn: "I reside in the second district of the Twelfth ward of the city of Scranton. . . . I am alderman of that ward. . . . The morning after the election the ballot-box for that district was left in my office; this box was taken by my housekeeper and laid up-stairs; the box is not there now; on the night of the 26th of October last, being Sunday night, about ten minutes after nine o'clock, two masked men entered my house while my children were studying lessons; my child hollowed 'Father! father!' when I heard the child scream, I got out of bed and came toward the front door, and seeing these masked men, with a revolver in each of their hands—one of the two demanded the ballot-box; whereupon I refused; the children screamed so that a boy, who slept up-stairs in my house, came down-stairs; one of the two men told him to go back, or he would

blow his brains out; the boy, seeing the confusion of the children around me, asked these men what they wanted. 'We want the ballot-box.' The boy said, 'You shall have it, but do no harm.' The first box he threw down was not used at the October election, 1873. *'We don't want that; there is another yet we want.'* We handed down the second box. *'That is the one we want.'* They carried the two boxes out of my office; that is the last I saw of them; the name of the boy I speak of was Henry Kelly; I do not know anything about who the masked men were; they were so completely disguised I could not recognize them."

William Burke sworn: ". . . I was at Alderman Kelly's house on the night of the 26th of October last. . . . Three other persons went with me. . . . We went disguised—our faces masked, false faces like—the alderman was in bed when we got there; we demanded the ballot-boxes; . . . in fact I can't tell all the alderman said; the children were around him; he said, 'Don't murder me;' he brought us the ballot-boxes; we smashed both of the boxes; we left the pieces upon the hill where we smashed them; we burned the ballots and papers that were in the boxes." Naming the parties who had revolvers, he said: "They presented their revolvers at the alderman; . . . I received two hundred and thirty-three dollars for going over there; I think the others received about the same thing—may be a little more; . . . I received the money the next Monday night." On cross-examination, he said: "I couldn't tell who appeared to be the ringleader of the gang; they didn't tell the alderman they would shoot him, but they had their revolvers out."

The testimony of this witness is quite lengthy. He goes over in detail the negotiations preliminary to the *enterprise*, giving the times when, and the places where they occurred. It is apparent, however, from the commissioner's report, that the witness was very drunk when this evidence was given. On the day following he was called again, as it is noted, for the purpose of correcting his testimony. He then says: "Well, me and Patrick McAndrews went and took the boxes right out from Alderman Kelly's; Patrick McAndrews was along with me, and we took the boxes out; . . . Patrick McAndrews was the man they called Peter O'Donnell the night this thing was done, but at that time he had something over his face; Dennis Kelly was with our party, but away from the house. I was up all night before I testified yesterday, and I could not remember the man then," etc. On cross-examination he said: ". . . I drank too much yesterday; I was pretty full of liquor; I couldn't tell whether I told the truth or not; I don't believe the evidence I gave yesterday was all untrue; I was so drunk I didn't know what I was talking about, but I am all right to-day; we took the ballot-boxes, one a-piece, right out, me and Patrick McAndrews; . . . we smashed the ballot-boxes. . . . After we smashed them we went down . . . and there burnt the papers. . . . I threw them in the fire after Pat McAndrews read them, and we knew we had the right papers. We burnt these papers because we wouldn't be found out. We were afraid Mr. Trimmer, or the likes of him, would find out; moreover, everybody was talking that Mr. Trimmer had more votes; . . . the reason we burnt these papers was, *we didn't want Mr. Trimmer to be elected; we wanted to keep the doctor out,*" etc.

Concerning the ballot-boxes in the Sixth ward, John Timlin swears: "The ballot-boxes were not brought into my charge: they were left in the house of one of the inspectors. They are now in my house. The ballot-boxes are in appearance in the same condition as when they were with the inspector that night; . . . they were handled around a good deal; . . . they were taken into a shed attached to the end of my house, and were there until after my wife was buried. I took them in afterwards myself. When I took the boxes back into the house I noticed that there *were no papers in them at all*. . . . The box, when I found it in the old shed, looked as though it had been disturbed; the lids were loose before ever it was taken to the shed. The box, when it was left with the inspector that night, was nailed up at each end, and it was so when it was brought to me next day," etc.

About the ballot-boxes in the Seventh ward, the following bit of history is not wholly uninteresting. Patrick Scanlon sworn: "I reside in the Seventh ward, Scranton city. The last October election was held at my house; I was not an officer of the election board. The ballot-boxes were left on the table in my house after the polls closed; they were taken from the table and put over on the shelf; they are in my house now. After the election the box was found out in my back-house; it was some time after the return had been made to Wilkesbarre; . . . I didn't examine the box to know what tickets it contained; some person, under my instructions, took the box back into the house; . . . it is now in my house just as I found it; I don't know who took the box away; we have had one election since—the constitutional election—I took the box down for them," etc.

John Biglin sworn: ". . . I acted as inspector of election on the question of the adoption of the new constitution; Mr. Scanlon handed us down a box from the shelf, and he said it was the one used for prothonotary votes at the last October election; I examined the box; I opened it myself; I did not find any tickets in it; *there was nothing there*," etc.

There is a large amount of other testimony in the case, challenging the purity of the returns from these three wards—the Sixth, the Seventh, and the second district of the Twelfth—on the one side, and vouching it on the other. There is also other testimony contradictory in some immaterial particulars of that given by the witness Burke, concerning the destruction of the ballot-boxes. More than this: there is testimony involving not only Mr. Barber's competitor himself, in attempts to procure the alteration of returns before they were presented at the meeting of the board of return judges, but involving, also, other parties not directly connected with the case, as abettors and accomplices in the work of making away with the possible tell-tale contents of those ballot-boxes. We may say, however, that such testimony was, in the main, met by prompt contradiction. Oath, at least, stands against oath. We leave it thus.

But with respect to the returns from the three districts named, our duty is plain; it admits of no doubt. We should prove recreant to the high trust reposed in us, if we suffered ourselves to falter one moment. They come to us wearing not only the habiliments of criminal negligence, but they are stamped with the impress of positive villany. The touch

of the forger is upon them; nay, more, the shadows of perjury compass them about. Neither the bleaching of out-houses, nor the fires nor the ashes resulting from that midnight raid of ruffians upon the Twelfth ward alderman, have been sufficient to obliterate the evidences of the wicked, official deformity which the returns themselves present. Without even a twinge of hesitation, we strike them from the general return altogether.

The same is done also with the return from the second district of the Ninth ward of Scranton. One hundred and four votes were returned as having been polled there for Samuel W. Trimmer, and twelve for the respondent. Without discussing the several grounds which form the basis of the specification against this return, it is enough to say, that the election was held without any previous registration of voters whatever. No registry list, therefore, could have been at the poll. If any affidavits were taken vouching anybody's right to vote there, they never found lodgment in the files of the proper office. It would seem, indeed, that voting there was an unrestrained pastime, and that anybody and everybody who happened along and desired to vote, was allowed to do so. In truth, there was not one single legal vote polled there that day.

The first and third districts of the Twelfth ward must be disposed of in the same summary manner. "The documents" constituting the record of the manner in which the election was conducted in these districts are so tarnished, to use a mild form of expression, by the criminally negligent conduct of the officers, as to be altogether unreliable for any purpose. In the first district of Twelfth ward, the return shows that eighty-nine votes were polled for the respondent, and one hundred and thirteen for Samuel W. Trimmer. Now, as an evidence of the official observance (!) of the election laws in these districts, we quote from the testimony of the custodian of the registry lists: ". . . the election boards of the first . . . and third districts of the Twelfth ward did not have certified copies of the registered list of voters; none were furnished them by the commissioners; they were prepared for them, but not called for or delivered." At the poll in the first district of the Twelfth ward, the officers seem to have had some sort of a registry list of their own; but according to that even, they managed to receive and count *one hundred and sixty-two votes* from persons whose names are not upon it, without requiring a single appropriate affidavit vouching the right to vote.

We come now to adjudicate upon the returns from the other election districts in the county, specified in the complaint and in the answer. We are sorry, indeed, to say that the instances are but few where the investigation has failed to establish the truth of the charges as laid. To use no stronger language, we repeat, the trail of official heedlessness, incapacity, if not criminal neglect, covers by far the greater part of them. We have shown already, that there was no mysterious sanctity about the record of an election, false upon its face, which could ward off untoward presumption. The doctrine promulgated in Duffy's case we still adhere to. The complainants and the respondent had a right to examine the acts of the election officers in these districts, as they were shown by the returns on file in the proper office. They had the further right to compare the list of voters in each district with the registry list,

and if names were on the former which were not on the latter, and there were no affidavits vouching the right of such persons to vote, the fact was established beyond all question that these persons had voted illegally; that their votes were illegal votes by positive mandate of law—"no person shall be permitted to vote on that day whose name is not on said list, unless he shall make proof of his right to vote, as hereinafter required."

The complainants in their petition on the one hand, and the respondent in his answer on the other, specified the districts in which such illegal votes had been cast.

The number in each district was also given. That these votes fouled the ballot-box will not admit of denial; that they were counted, is conceded on all sides; that they were as powerful in effecting a general result, as any like number of votes polled in strict conformity with law, will hardly be questioned. Now, for whom were they counted? That is the question upon which the whole controversy depends, and around that question necessarily hangs abiding doubt. Indeed, the natural order of things has interposed a veil which renders a true solution forever impossible. But human society and human laws can never be so constructed, that courts can render perfect justice under all circumstances. Occasions will constantly arise when approximate justice is all that can be administered.

Taking these election returns, then, as they are, shall we say that the illegal votes shown to be embraced in them, so contaminate the whole poll and render the result so uncertain in each instance, that the good and the bad, the legal and the illegal votes, shall alike be thrown out altogether? This would be doing more than the pleadings in the case suggest. Does any man in his sober senses believe that there were no legal votes at any of these polls? When it is possible, it is the duty of a court, in a proceeding like this, to see that every legal vote cast shall be counted, not thrown away. We said on a former occasion, that a scoundrel or a blockhead, sitting as an officer at an election poll where hundreds of honest and qualified electors were depositing their ballots, might receive one or more from a person or persons whose name or names were not on the registry list, without requiring the affidavits specified by law; and that, to throw out the whole poll because of this, and thus disfranchise a large body of men who were not only entitled to the right of the elective franchise, but who had exercised that right in complete conformity with law, would be simply monstrous. Indeed, if this were the rule, it might be possible for wicked men to disfranchise thousands of honest voters all over the Commonwealth.

We recount here another principle of law, as old as civilization itself, and one upon which courts of justice have always acted. It is, that no man shall profit by illegal acts, whether done by others for him, or by himself, in the effort to advance his own individual interest, to the prejudice or injury of another's rights.

Now, in election districts where legal and illegal votes have been counted indiscriminately, and a majority has resulted, whether for one candidate or the other, it is idle to say, that he who received that majority was not thereby advantaged; it is equally idle to say that such advantage did not result, in some respects at least, from the illegal

acts of the officers conducting the election. But we have shown that such illegal acts, under such circumstances, should not disfranchise honest voters, if the possibility existed to prevent it; neither should they work advantage, no matter how small, to anybody.

In our judgment, then, the only solution of the difficulty—indeed, the only means whereby even approximate justice can be administered in the premises—is to require him for whose benefit the wrong enures, to lift the curse which the law has laid upon all illegal ballots. Is there any hardship in this? The complainants gave the respondent notice of the existence and the number of these illegal ballots in his majority districts; he, in turn, gave them notice of the existence and the number of illegal ballots in other districts where he was not in majority. Besides, the name of each illegal voter was down upon the record; it had but to be read to be known. Either side, therefore, had the opportunity of pointing out the good from the bad, of separating the wheat from the chaff. The day in court passed, however, and this was not done; it was scarcely attempted.

To conclude; We say now, once for all, that the election laws in this county must be observed; that criminal recklessness and neglect on the part of the election officers must cease; that the perpetration of frauds and forgeries in connection with the exercise of the elective franchise, no matter from what quarter they be incited, must stop.

The count of legal votes under the principles laid down is as follows:

According to the general return, Albert P. Barber received in the whole county 8,060 votes.

Deduct the number thrown out, thus:	
Sixth ward, Scranton	55
Seventh " "	30
First district, Twelfth ward, Scranton	89
Second " " " "	114
Third " " " "	60
Second " Ninth " " "	12
Deduct also the number not vouched in conformity with the statute, thus:	
Abington, North district.....	35
Ashley Borough "	28
Blakely " "	9
Benton " "	19
Carbondale City, First ward.....	24
" " Second "	50
Exeter	13
Fairmount.....	10
Gibsonburg Borough	24
Greenfield "	7
Huntingdon "	11
Jenkins, North district.....	13
Kingston Township, Southeast district	25
Lehman	1
Lackawanna.....	31
Madison	17
Pittston Borough, Second ward	17
" " Fourth "	26
" " Sixth "	16
" Township, South district.....	25
" " North "	28
West Pittston Borough	23
Plymouth Township, East district.....	20
" Borough, " ward.....	77
Kingston "	5

Plains.....	97
Shickshinny Borough.....	10
Spring Brook.....	4
Scott.....	15
Waverly Borough.....	6
Ross.....	23
Covington, North district.....	93
Wilkesbarre City, Fourth ward.....	29
" " Sixth ".....	49
" " Seventh ".....	8
" " Eleventh ".....	46
" " Twelfth ".....	8
Wright.....	24
Wilkesbarre City, Tenth ward.....	16
Franklin.....	7
Scranton City, First ward.....	12
" " Second ".....	17
" " Third ".....	20
" " Fourth ".....	54
" " Fifth ".....	159
" " Eighth " First district.....	47
" " Eighth " Second ".....	58
" " Ninth " First ".....	72
	<u>1,687</u>
Barber's legal vote.....	6,363
According to the general return, Samuel W. Trimmer received in the whole county.....	7,678
Deduct the number counted for him in the Scranton districts, but thrown out, thus:	
Sixth ward, Scranton.....	52
Seventh ".....	32
First district, Twelfth ward, Scranton.....	113
Second " " " ".....	112
Third " " " ".....	9
" " Ninth " ".....	104
Deduct also the number counted for him in the following dis- tricts, but not vouched in conformity with the statute, thus:	
Bear Creek.....	6
Blakely Township, North district.....	56
" " South ".....	65
Black Creek.....	2
Buck.....	3
Carbondale City, Fourth ward.....	33
Covington, South district.....	1
Dallas.....	9
Denison.....	6
Dunmore Borough, First ward.....	12
" " Second ".....	6
" " Third ".....	6
" " Fourth ".....	5
Foster Township, North district.....	24
" " South ".....	8
Hanover Township, North district.....	4
" " South ".....	9
Hasleton Township, West district.....	11
" " South ".....	9
Hasleton Borough, East ward.....	15
" " West ".....	3
Hollenback, North district.....	2
" " South ".....	4
Jenkins.....	5
Newton.....	1
Newport.....	7
New Columbus Borough.....	2

Old Forge	2
Pittston Borough.....	8
Pleasant Valley.....	16
Plymouth Township, West district.....	12
" Borough " ward	7
Roaring Brook.....	2
Ransom.....	1
Salem.....	5
Sugarloaf.....	7
Sugar Notch Borough.....	2
Scranton City, Tenth ward.....	7
" " Eleventh " 	22
Wilkesbarre City, First ward.....	3
" " Second " 	3
" " Fifth " 	8
" " Eighth " 	31
" " Thirteenth " 	2
" " Fourteenth " 	27
Wilkesbarre Township, North district.....	30
" " South " 	9
	<hr/>
	940

Trimmer's legal vote..... 6,738
Trimmer's majority, 375.

And now, September 14, 1874, this cause having been heard upon the evidence, and having been argued by counsel and fully considered by the court, and it appearing to the court that at the election for the county of Luzerne, held on the second Tuesday of October, 1873, Samuel W. Trimmer received for the office of prothonotary for the county of Luzerne a majority of legal votes given for said office, and was consequently duly elected thereto; the court do, therefore, determine and adjudge that the said Samuel W. Trimmer was, at the aforesaid election, duly elected to the office of prothonotary for the county of Luzerne. And they do further adjudge that the costs of this contested election proceeding be paid by the county of Luzerne.

Court of Common Pleas of Montgomery County.

[Leg. Int., Vol. 31, p. 157.]

COMMONWEALTH OF PENNSYLVANIA *ex rel.* E. L. ACKER, *vs.* ELIJAH THOMAS.

A board of school directors can appoint to fill a vacancy, until the next annual election.

Quo warranto. Opinion delivered *February 9, 1874*, by

Ross, P. J.—The relator insists that he is entitled to a seat in the school board of the borough of Norristown, by virtue of his certificate of election for the Third ward. The suggestion filed avers that Mr. Potts, who represented the ward in the board, and whose term would have expired on the first Monday in June, 1875, resigned in the spring of 1873. The board, in pursuance of the power vested in them by the act of May 7, 1874, section 7, Purdon, pl. 22, 238, 240, filled the vacancy thus created by the appointment of James Shannon. This gentleman moved from Norristown, again creating a vacancy in September, 1873,

which was again filled by the board, who appointed Mr. Elijah Thomas. Mr. Thomas took his seat in the board, and assumed the performance of his duties as school director. What are commonly known as the spring elections were, by a provision in the charter of the borough of Norristown, held in October, at the time of the general election. At that election the voters of the Third ward proceeded to elect one person to fill a full term, and also one person to fill the vacancy caused by the successive resignations of Messrs. Potts and Shannon. At this election the relator was a candidate for school director, and was one of the highest two, receiving, however, a less vote than the other gentleman who was elected. The ballots cast did not, however, indicate for whom the elector intended to vote, either for a full term, or to fill a vacancy.

The respondent, Mr. Thomas, retained his seat in the board after the election, and still exercises the franchises of school director, and the relator has not been received by the board as one of its members.

To the suggestion thus filed the respondent, waiving all preliminary rules and orders, demurs, and we are asked, in view of the approaching election, upon the 17th, to pronounce a final judgment at once.

The inquiry which is presented by the record is simply this: For what length of time can the board appoint a person to fill a vacancy?

The entire power of appointment vested in the board is statutory; and the question presented is simply one of statutory construction.

The seventh section of the act of 1854, Purdon, pl. 22, 239, appears to be clear and unambiguous.

"Each board of directors shall have power to fill any vacancy which may occur therein by death, resignation, removal from the district, or otherwise, until the *next annual election* for directors, when such vacancy shall be filled by electing a person from the district in which the vacancy occurs to supply the same."

Let us pause for a moment and analyze the power and its limitations thus devolved upon the board. If the section had provided simply, "that the board shall have power to fill any vacancy which may occur therein from death, resignation, removal from the district or otherwise," I think there could be no doubt in the conclusion that the appointee would have the unquestioned right to serve out the full term of the person whose vacant seat was thus conferred upon him. But the statute has a succeeding clause, and that is most undoubtedly a limitation upon the general power given to fill the vacancy. That limitation is so clear that its nature and scope cannot be doubted; for the act, after thus giving the general power to fill a vacancy, declares it shall be "*until the next annual election for directors.*" That this would limit the term of the appointee until the annual election, if it were the only remaining clause, seems hardly to admit of question; for a power to do an act until a special time, or until a certain event, implies that after the act has been done, or the event transpired, the power devolved, pending such act or event, is withdrawn. This is well settled by the courts in the construction of powers in wills, and deeds of trusts, and in our own State was so firmly grafted in our system of jurisprudence, that the real estate act of 1853 was enacted to meet and provide for the difficulties it engendered. But the Legislature did not stop here; in order that there should be no ambiguity or doubt, this limitation upon power was further

enforced by adding, "*when such vacancy shall be filled by electing a person from the district in which the vacancy occurs to supply the same.*" Nothing can be clearer than this. The adverb "*when*" directly refers to the annual election. That designates the time when the appointee of the board must terminate his functions, for the power devolved upon him by the appointment is then exhausted. He at once, after an election, is *functus officio*, and the vacancy temporarily supplied by the exercise of a special and limited power given to the board, is filled by the elected person, who, in the language of the act, is "*to supply the same.*"

This is the plain, unmistakable language of the act. Any other construction would be forced and strained; worse even than this, it would construe the section, by implication, to a meaning in contradiction of its terms. But this is not admissible in the construction of statutes, and would violate a well-settled canon of interpretation.

The respondent relies on an opinion of Judge Conyngham, deciding the point at issue here directly in his favor. This opinion has been submitted to us; and like everything that emanated from that learned and able jurist, is ingenious, plausible, and supported by a train of reasoning. An authority so respectable is entitled to a most respectful consideration; and in differing from the conclusions reached by the learned judge as indicated by that opinion, I have considered anxiously and carefully the weight of the arguments adduced by him. His position seems to be this: 1. That statutes *in pari materia* shall be construed together: Sedgwick on Stat. 247. This is true beyond all question. 2. He then declares that the school law means in its present form, that those elected for a full term shall take their seats at the beginning of the school year. This is also true; and it was wise legislation, as the learned judge ably demonstrates. But upon these premises he bases an inference, which is, that because one elected for a full term cannot take his seat until the beginning of the school year—one who is elected to fill a vacancy is in the same situation. If the act of 1854, sec. 7, *supra*, terminated with the word "*otherwise,*" this would be true. But when it makes a special provision, and that direct and unmistakable, it cannot be implied out of existence. A single illustration, which is the application of the *reductio ad absurdum* to the reasoning of the learned judge, demonstrates this. If Mr. Potts' term had expired on the first Monday of June, 1874, and he had resigned in the summer of 1873, it cannot be doubted that a vacancy would have been created. It is equally clear that this was a vacancy that the board were competent to fill. But if it were such vacancy, then the legal right of the people to elect—the vacancy having occurred before the annual election—is equally clear under statute. But if Judge Conyngham be correct, and the appointment of Mr. Thomas continued until the end of the school year, the person elected under an election ordered by statutory authority, could never take his seat for the term to which he was lawfully elected, although he was elected to supply a vacancy for that very term. This would be absurd. To order a popular election, which could have no result, would be as profitable as a bull against the comet; and it cannot be supposed that the Legislature intended such a palpable absurdity. The error of the learned judge was, in not recognizing a statutory mode to fill a vacancy, which deflected from the general system.

But his reasoning upon the ground of public policy is no stronger than this construction of the act itself. A vacancy occurring, an appointment *until the annual election* must be made by the board. A new man is thus interjected, as it were, into the board—and if harmonious action, based upon previous knowledge and assent of and to official acts, is the controlling spirit of the school legislation, then the learned judge should have held that though the act conferred the power to appoint, it was a “so called” power, the exercise of which was prohibited by implication. If the reasoning be good to destroy the limitations upon the power, it should be equally efficient to annihilate the power itself.

The theory of this legislation is simply this: The law contemplates a designated number of persons to whose judgment the interests of education shall be locally intrusted. They are to be designated by the people at an election. If after such designation, the number is reduced by any cause, the vacancy shall be supplied by the board, for the reason that there is no other convenient mode—and the law, like nature, abhors a vacuum; but as popular government and popular selection are involved in the theory of its creation, the law also provides that the appointee of the board shall enjoy official existence only to that time when the popular will is expressed by a vote designating a person to supply the vacancy thus temporarily filled by the statutory power vested in the board. This is a harmonious construction of the entire act. It involves no conflict, and no part of the act is rejected. The rule of interpretation older than Blackstone is, that statutes are to be so construed that the whole shall be made to live, rather than that any part should perish. Adopting this rule, we are compelled to reject the conclusions presented by Judge Conyngham; and we think the reasoning here demonstrates, that the learned judge was in error in ruling as he did.

That the ballots did not designate the term for which the relator was elected is immaterial. The second section of the act of April 11, 1842, *Purd. pl. 27*, disposes of any difficulty upon that score.

This opinion might readily be strengthened by an analysis of this section; but enough has been said to justify the conclusion which we now announce, which is, that Mr. Thomas' official life, created by the action of the board, terminated upon the election of the relator, Dr. Acker; and that Dr. Acker is entitled to the seat now unlawfully filled by Mr. Thomas.

And now, February 9, 1874, judgment in favor of the relator.

J. R. Hunsicker and B. Markley Boyer, Esqs., for relator.

B. E. Clain, Esq., for respondent.

Court of Common Pleas of Schuylkill County.

[Leg. Int., Vol. 31, p. 72.]

THE PHILADELPHIA & READING RAILROAD COMPANY vs. LAWRENCE, MERKLE & Co. *et al.*

The right of eminent domain in the State cannot be restricted except as provided by the constitution, delegated by the inherent power of the people. It is an infringement of that instrument to allow private property to be taken for private use. This can only be done for public purposes, and by paying or securing the payment thereof. The 10th section of Article IX. is a disabling, not an enabling, clause.

When a railroad takes private property for public use under the act of February, 1849, and its supplement, they are bound to follow the provisions of the law strictly. Any departure will render them trespassers.

After entry and payment of damages or securing the same, the right of way over the land vests in the company. After filing of the bond, the owner can recover damages only.

An owner within the purview of the act is one who has some interest in the land at the time the injury was done. One who has acquired an interest therein, either in fee or as tenant for years, or as lessee after the injury has been committed, is entitled to no damages.

If there be errors in the view or any part of the proceedings, the remedy is to file exceptions in court, and if not sustained, to certiorari the proceedings. When, however, an appeal is taken within the thirty days allowed by law to the report of the viewers, all irregularities are waived, and all the requirements of the statute are presumed to have been done.

When a party having knowledge of the possession and use of the land by a railroad company, afterwards takes a lease of the coal beneath, he cannot require the company to remove the track, and his only remedy, if he has any, must be under the statute for damages.

In equity. Injunction. Opinion delivered *December 22, 1873*, by

WALKER, J.—This is a bill in equity presented to the court, praying for equitable relief to restrain the defendants by writ of special injunction, preliminary until hearing, and perpetually thereafter, from mining and removing any coal below the surface of the ground over which the inclined plane, known as Mahanoy Plane, passes.

Upon filing bond the writ issued, an answer was put in by Lawrence, Merkle & Co. (lessees of the land), but none on part of the owners of the land. Depositions were taken, and the case was ably argued by counsel on a final hearing.

The bill sets forth that the Mahanoy and Broad Mountain Railroad Company was chartered under the provisions of the act of assembly of 19th of February, 1849, and that about the year 1860, the said railroad was completed, including the inclined plane, from the top of the mountain to Frackville, 2,800 feet down the slope of the mountain; that the plane was constructed at a great expense, is in constant use, and is the main outlet of coal in the Mahanoy valley, and that millions of tons of coal pass over it every year; that the said railroad company acquired the title to the right of way over the land, under proceedings in court and by release from John Gilbert, and the other landowners on 2d of November, 1868; that by virtue of certain acts of assembly set out in the bill, this railroad was consolidated and vested in the Philadelphia and Reading Railroad Company; that the respondents, subsequent to the entry of the Mahanoy and Broad Mountain Railroad Company upon the land, became the lessees of the right to mine coal in said land; that

they (the respondents) are now about mining and removing the coal immediately under the plane, and that the plaintiffs have notified the respondents not to proceed, and to which notice the said respondents have paid no attention.

The record shows that upon petition of the Mahanoy and Broad Mountain Railroad Company, presented on 17th of November, 1862, to December Term, 1862, No. 291, setting forth among other things, that the company were unable to agree with the owners of the land about to be taken and occupied by the railroad, the Court of Common Pleas of Schuylkill county appointed viewers to assess the damages as required by the act of assembly; that the said viewers made report on 3d of February, 1863, which was referred back, and a revised report was afterwards made and filed. From this second report the owners of the land appealed to the court, and on same day filed their recognizance.

On 2d of November, 1868, the company paid \$570 to the owners, and took a release from them, which was recorded on 16th of January, 1869, and an agreement was filed by order of court, on same day, signed by the parties to the suit, discontinuing it.

On 1st of January, 1868, the owners leased the right to mine coal in this land (over which the plane passes) to Lawrence, Merkle & Co., the respondents. The plaintiffs claim this easement by right of eminent domain delegated to them by the State by virtue of the provisions of the act of assembly of 19th of February, 1849, termed the general railroad act, and its supplement of 9th of April, 1856, and they contend that the removal of the coal beneath the surface will destroy the inclined plane and forever deprive them of the right of way over the land; that this being the great thoroughfare for the transportation of coal from the Mahanoy valley, the public interests imperatively demand that this avenue shall be left open, free from peril and detention. Lawrence, Merkle & Co., the respondents, in their answer admit most of the material averments of the bill, but claim that they have an interest in the land as lessees from John Gilbert and the other owners, by agreement dated 1st of January, 1868, by which they have the privilege to mine all the coal beneath the plane, and for which they have received no compensation; that as to them, they say the plaintiffs are trespassers, and have no right to invoke the aid of a court of equity to restrain them from the enjoyment of their legal rights under the lease.

The right of eminent domain is one of the attributes of the sovereignty of the State, invaluable to the Commonwealth, and cannot in any way be restricted, except as provided by the 10th section of Article IX. of the constitution, which provides, *that no man's property shall be taken or applied to public use, without the consent of his representatives and without just compensation being made.* This is a limitation upon the right of eminent domain: *Gilman vs. Sheboygan*, 2 Bl. 510; and is decided to be a *disabling*, not an *enabling* clause: *Harvey vs. Thomas*, 10 Watts, 66.

It is also further provided by the 4th section of Article VII. that "*the Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owner of said property, or give adequate security therefor, before such property shall be*

taken." The distinction being, that when the State exercises the power of eminent domain, it must provide the means of payment before taking the property, but a corporation must pay or secure its price: *McClinton vs. Pittsburgh & Fort Wayne Railroad Company*, 16 P. F. S. 404. And when a corporation takes land, the owner has a right to trial by jury, which he has not, when the State takes it by right of eminent domain: *The Pennsylvania Railroad Company vs. Ger. Lutheran Cong.*, 3 P. F. Smith, 445. And the State has the right to six per cent. of all land by express reservation: *Commonwealth vs. Fisher*, 1 Pa. Rep. 462.

While the State may delegate her right of eminent domain to a corporation or individual (*Brown vs. Corey et al.*, 7 Wr. 504), it can only be exercised for public purposes intended to benefit the public: *Lance's Appeal*, 5 P. F. S. 16. For the right of property in every well-regulated community is subservient to the general welfare. It may be exercised not only for the public safety, but also for the interest or even convenience of the State or its inhabitants. It does not authorize the government to take the property of one citizen and transfer it to another where the public is not interested in the transfer. Such an arbitrary exercise of power would be an infringement of the constitution, as not being within the power delegated by the people to the Legislature: *Pittsburgh vs. Scott*, 1 Barr, 314.

The act of 19th February, 1849 (Pur. Dig. 1219, Pl. 35), provides "that before a company shall enter upon or take possession of any lands or materials, they shall make ample compensation to the owner or owners thereof, or tender adequate security therefor."

It should be borne in mind that the right of a railroad company is only to occupy the land, and is an easement, not an interest in the land: *Western Railroad Company vs. Johnston*, 9 P. F. Smith, 290; *Big Mountain Improvement Company Appeal*, 4 P. F. Smith, 361, and cases cited. And the owner is bound to leave proper supports so as not to impair the surface: *Hurris vs. Ryding*, 5 M. & W. 60; *Jones vs. Wagner*, 16 P. F. Smith, 429; *Rogers on Mines*, 200, 201, 459, 460; *Washburn on Easements*, *478, 479. Were *Lawrence, Merkle & Co.* (the lessees) owners of the land on 1st January, 1868, in the sense of the statute?

Tenants for years are owners within the purview of this act (*N. Pa. Railroad Company vs. Davis and Leeds*, 2 C. 238). And a person having a life-estate is entitled to compensation (*Borough of Harrisburg vs. Crangle*, 3 W. & S. 460; *Railroad vs. Boyer*, 1 Harris, 497); so is a lessee (*Turnpike Road vs. Brosi*, 10 Harris, 29); and the license of the owner would not affect the tenant's interest (*Brown vs. Powell*, 1 Casey, 229).

The respondents under these decisions would, without doubt, be entitled to compensation, if they had any interest in the land at the time it was taken by the company. They contend that as their rights became vested in January, 1868, the subsequent release of the owners in November following could not affect them. To ascertain this, it is essential to determine the time when the right to the land vested in the company, and the right to compensation passed to the owners—for only those who were owners at that time (to wit, *the time when the right of way vested in the company*) are entitled to damage, not subsequent owners by purchase or otherwise.

Did the right of way vest in the company before the appeal was taken in March, 1863, or when the release was executed in November, 1868?

The company can only take the land by paying for it or securing the payment. Before this is done the land belongs to the owner. He may bring his action of ejectment for it: *McClinton vs. Pittsburgh, Fort Wayne & Chicago Railroad Company*, 16 P. F. Smith, 404. Or he may sue the company as trespassers, for every act of theirs is tortious: *Western Railroad Company vs. Johnston*, 9 P. F. Smith, 290. Or they may be enjoined before compensation is made: *Jarden vs. P. W. & B. Railroad Company*, 3 Whart. 502; *Masson's Appeal*, 20 P. F. Smith, 30. For they are bound to proceed as the act prescribes: *Brown vs. Powell*, 1 Casey, 229. "And as the exercise of eminent domain is in derogation of private right, the authority must be strictly construed. *What is not granted is not to be exercised*:" Dwarria on Statutes, 750; *Allegheny vs. Ohio & Pa. Railroad Company*, 2 C. 355; *Lance's Appeal*, 5 P. F. Smith, 16; *Vanhorn vs. Dorrance*, 2 D. 310. Public grants to corporate bodies must be construed strictly: *Packer vs. Sunbury & Erie Railroad Company*, 7 Harris, 211. If there be any irregularities in the proceedings of the viewers, or errors in the record, the owner may file exceptions in court, and if dissatisfied, he still has his remedy by *certiorari* in the Supreme Court: *Hall's Appeal*, 6 P. F. Smith, 238; *Reitenbaugh vs. Chester Valley Railroad Company*, 9 Harris, 100. He may do all this and yet retain the full title to the land. After filing of the report of viewers, and within thirty days, if the amount awarded him be insufficient, he may appeal and have a trial by jury.

There is no formal transfer required of the right to occupy the land. This right by operation of law *eo instanti* vests in the company, after entry and payment of damages, or filing the bond for those interested as provided by the act. After an appeal is taken everything previously required is presumed to have been done, and every irregularity is waived.

The owner is powerless to recover the land again. The bond filed under the act is the security for the damages, and the damages are substituted for the land, and this security is for damages occasioned as well by the construction as the location of the road: *Wadhams vs. Lackawanna & Bloomsburg Railroad Company*, 6 Wright, 303, for it would be inequitable to hold that an owner might take his chances for damages before a jury, and failing to recover the figure he placed upon them, turn around and claim the land, and treat the company as trespassers.

Hence it has been ruled that when a party intends to stand on irregularities in the record of initial proceedings, *certiorari* is the remedy to have the proceedings set aside for irregularities. *Appeal waives this*: *Delaware Railroad Company vs. Burson*, 11 P. F. Smith, 379. After appeal the maxim, "*omnia præsumuntur rite esse acta*," is not only applicable to the judgments of courts, but it ordinarily applies to matters of form and order: *Church vs. Railroad*, 9 Wr. 342. The taking of the appeal therefore admits the entry of the company, and the filing of the bond with approved security, and by these acts the right of way passes to and vests in the company. Compensation being made, the title of the

owner will be vested in the company: *McClinton vs. Pittsburgh & Fort Wayne Railroad Company*, 16 P. F. Smith, 404. If the respondents have any interest not covered by the bond, their right exists to petition for viewfers. They must exhaust their statutory remedy before they can otherwise act: *High on Injunctions*, § 394; *McKinney vs. Mon. Navigation Company*, 2 Harris, 65; *Railroad vs. Boyer*, 1 Harris, 500. It is admitted that the respondents had no interest in the land when the appeal was entered. As the bond was substituted for the damages, none but the owners at that time can recover upon the bond. For the jury are to value the injury to the property at the time the injury was suffered: *Schuylkill Navigation vs. Thoburn*, 7 S. & R. 411. If the very next day the owners had sold the land in fee simple, it is certain that this claim for damages would not pass to the purchaser: *Zimmerman vs. Union Canal*, 1 W. & S. 346; *Schuylkill & Susquehanna Navigation vs. Decker*, 2 W. 343. Hence a less interest (such as a right to mine coal below the surface) would not pass. Therefore no claim for damage could possibly pass to the lessees: *Sibbald & Mann's Appeal*, 6 Harris, 249.

The evidence shows that the respondents were not ignorant of the possession of the land by the company many years before they leased, and of their improvements and expenditures, and since the date of their lease they have not sought their statutory remedy. One who stands by in silence and sees the company expend their money in improvements will be estopped in equity from regaining possession of the land, and his only remedy will be for damages sustained: *Western Railroad Company vs. Johnston*, 9 P. F. Smith, 290; *Big Mt. Improvement Company Appeal*, 4 P. F. Smith, 361; *High on Injunctions*, § 397; *Hentz vs. Long Island Railroad Company*, 13 Barb. 646; *Erie Railroad Company vs. D. L. & W. Railroad Company*, 6 C. E. Green, 283; *Washburn on Easements*, *63, and notes. "And where large improvements have been erected, considerations of public policy, as well as the recognized principles of justice between parties, require the courts to hold that in such cases the property of the owner cannot be reclaimed, and there only remains to him a right of compensation. Under such circumstances his omission is an implied assent, for he who will not speak when he should, will not be allowed to speak when he would." *Goodin vs. Canal Company*, 18 Ohio St. 169, per Welch, J. If this coal be worked out the public interest must seriously suffer, a great thoroughfare be broken up, and the company's vast expenditures be rendered valueless. For these reasons the special injunction was properly issued and should remain.

Decree accordingly.

George B. De Keim and James Ellis, Esqs., for plaintiff.

Charles Brumm and Lin Bartholomew, Esqs., for respondents.

[Leg. Int., Vol. 31, p. 141.]

BRIGHT & Co. vs. THE OAKDALE COAL AND MINING COMPANY.

The act of April 14, 1851, authorizing judgments to be taken in certain cases where no affidavit of defence is filed, in Schuylkill county, is not annulled or repealed by section 26 of Article V. of the new constitution.

Where it was intended by the constitution to annul or abrogate any existing law, the intention is expressed in unambiguous language.

Rule to show cause why judgment taken for want of an affidavit of defence should not be set aside, etc.

Opinion delivered *March 23, 1874*, by

PERSHING, P. J.—A special act of assembly for the county of Schuylkill, approved April 14, 1851, authorizes the taking of judgment in certain cases where no affidavit of defence is filed. By the 47th rule of court, judgments under said act may be taken on any motion-day after twenty days from the return-day of the writ. Section 26, Article V., of the constitution, provides that "all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of said courts, shall be uniform," etc.

It is contended that the act of 14th of April, 1851, being a special law, applicable alone to Schuylkill county, is annulled or repealed by that clause of the recited section, which requires all laws relating to courts to be general, and of uniform operation; that said act is inconsistent with the constitution, and, therefore, not kept in force by the second section of the schedule. In this case, and another recently before us, this view has been pressed with great earnestness, and the power of the court to give judgment for want of an affidavit of defence, explicitly denied. We are thus compelled to decide the question of power raised.

Giving the words in this section their natural and ordinary meaning, which is a cardinal rule of interpretation, there is nothing which indicates an intention to repeal the laws relating to courts which were in existence at the time of the adoption of the constitution. We think it is future legislation that is provided for, and not the abrogation of past enactments of the Legislature on this subject. The construction insisted upon by those who deny our power under the act of 1851, and the rule of court based upon it, to give judgment for want of an affidavit of defence, abrogates in every judicial district throughout the State such rules as are not general and of uniform operation, and this, without providing any way of ascertaining what rules are general, and of uniform application in all of the many courts of the State. A repeal so sweeping cannot be gathered from a fair interpretation of the language employed in this 26th section.

Sir Edward Coke declares that the most natural and genuine method of expounding a statute is by examining the whole, with a view to arrive at the true intention of each part. An examination of the constitution shows that when it was the purpose to annul or abrogate any existing statute, as a result of the adoption of that instrument, the intention was

expressed in unambiguous language. Section 2 of the schedule "abolishes" the Court of Criminal Jurisdiction for the counties of Schuylkill, Dauphin and Lebanon. By section 21, Article III., "Acts now existing are avoided" which limit the time within which suits may be brought against corporations for injuries to persons and property; and by section 22 of the same article, "Acts now existing are avoided" authorizing the investment of trust funds in the bonds or stock of any private corporation. All existing charters under which a *bona fide* organization had not taken place at the date of the adoption of the constitution, were made of "no validity" by section 1 of Article XVI. No clause avoiding, or making of no validity, existing acts can be found in section 26 of Article V. If the effect of repealing or abrogating existing statutes is given to this section, the same effect must be given to other sections where similar language is employed. For example, section 1, Article IX., provides that "all taxes shall be uniform upon the same class of subjects, . . . and shall be levied and collected under general laws," etc. Can it be claimed that this, *ipso facto*, repeals the tax laws existing at the time the constitution was ratified by the people?

When the inquiry is directed to ascertain the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument: Cooley's Constitutional Limitations, p. *65. In the sixth volume of the Debates of the Convention, page 507, *et seq.*, will be found the discussions on section 26 of Article V. The section, as reported from the committee, was as follows: "All laws relating to courts shall be general, and of uniform operation, and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgment and decision of such courts shall be uniform."

It is a fact of some weight that the convention amended the section by striking out the words "proceedings and practice." It was shown that the systems of practice in different portions of the State were so various that the adoption of the section as reported might cause much embarrassment. The chairman of the judiciary committee (Mr. Armstrong) said, "This section, if adopted, would not apply to laws as they at present exist, but only as to future legislation, and with the amendment suggested" (striking out the words "proceedings and practice") "I think it a section of very great importance." These proceedings show that it was intended and understood by the convention that the 26th section of Article V. should have a prospective operation, and that the general and uniform laws relating to the courts commanded by it were to be the work of the Legislature in the future.

A constitution shall operate prospectively only, unless the words employed show a clear intention that it shall have a retrospective effect: Cooley's Constitutional Limitations, *62. The same rule applies to statutes: *Ibid.* Statutes are always construed as prospective, unless courts are constrained to the contrary by the rigor of the phraseology: *Price vs. Mott*, 2 P. F. S. 315, per Woodward, C. J. The 7th section of Article III. and the 26th section of Article V. relate to the same subject, and can properly be read together, and when so read, the prospective character of these constitutional provisions will be very appa-

rent: Article III., section 7. "The general assembly shall not pass any local or special law . . . regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts," etc., but Article V., section 26: "All laws relating to courts shall be general, and of uniform operation."

If this mode of reaching a decision is not satisfactory, we have the assistance of judicial investigation. In examining the question in this case, we have found a case which fairly rules it. In *Allbyer vs. State*, 10 Ohio, N. S., 588, a question arose under the provision of the Constitution of the State of Ohio, that "all laws of a general nature shall have a uniform operation throughout the State." Another clause provided that all laws then in force, not inconsistent with the constitution, should continue in force until amended or repealed. This clause is almost identical in language with the 2d section of the schedule of the constitution recently adopted in this State. Allbyer was convicted and sentenced to imprisonment under a crimes act previously in force, applicable to Hamilton county only, and the question was, whether that act was not inconsistent with the provision above quoted, and, therefore, repealed by it. The court held that the provision quoted evidently had regard to future and not to past legislation, and, therefore, was not repealed. It is said a similar decision was made in *State vs. Barbee*, 3 Indiana, 258. It seems to us that both reason and authority are against the position taken by the counsel for defendant.

The rule granted in this case to show cause why the judgment taken against the defendant for want of an affidavit of defence should not be set aside upon the ground, that the power of the court to give judgment for want of such affidavit under the act of April 14, 1851, is taken away by section 26, of Article V., of the constitution, is discharged.

[Leg. Int., Vol. 31, p. 205.]

SHOMO vs. ZEIGLER.

A verdict of a jury will not be set aside for the misconduct of a juror in conversing about the cause on trial with a witness before or during the trial, when no improper influence or bias is shown, unless such misconduct was caused by a party to the suit, or his agent, or by his representations, and proof of the bias must be clear and manifest.

The general rule in Pennsylvania is, that all papers given in evidence in the trial of the cause, except *depositions*, are to be sent out with the jury.

A certified record of bankruptcy offered in evidence during the trial, through which the plaintiff claims the land, may be sent out with the jury, even though there are depositions attached to the proceedings relative to the bankruptcy, but immaterial to the controversy. Such depositions stand on a different footing from ordinary depositions, for the record cannot be cut up and mutilated.

It is the duty of counsel to object to papers before they are admitted to the jury-room.

Rule to show cause why a new trial should not be granted. Opinion delivered April 13, 1874, by

WALKER, J.—There are four reasons assigned for a new trial, viz.:

1. The verdict was against the law and the evidence.
2. The court erred in its construction of the agreement of the 26th February, 1863.
3. The jury were improperly interfered with.
4. That papers were sent out with the jury that were not in evidence.

to wit, the entire record in bankruptcy, including depositions that had been previously refused the defendant to use.

As to the first reason: There were disputed facts in this case, such as the defendant's possession, the wife's title, and other facts, which were properly submitted, and which the jury found: *Cross vs. Carey*, 25 Ill. 562. We see nothing in this for disturbing the verdict.

2. The construction we put upon the agreement referred to, was that it was an exchange of properties, and amounted to a sale. By the terms of the agreement after performance of the covenants, and possession taken, the equitable or beneficial title passed to Zeigler, and through him by the assignee's sale to the purchaser, even though the legal title remained in Turner, and upon his death his interest under the agreement would descend to his heirs as money, if any part of the consideration remained unpaid, and *not as land*. After the execution of the agreement, Turner held the legal title to the premises as trustee for Zeigler: *Garrard vs. Lantz*, 2 Jones, 194; *Morgan vs. Scott*, 2 C. 51; *Schock vs. Bankes*, 1 Leg. Chron. 218. We think this is correct. This point has not been pressed by counsel for the defence.

The third reason is improper interference with the jury.

The court may set aside the verdict of a jury for misconduct, and where it is prejudicial to the losing party, *will* do so. But the granting of a new trial, like the granting of a continuance, or taking off of a default or opening a judgment, rests in the sound discretion of the court: 2 Graham & Waterman on New Trials, 43 to 50; *Gray vs. Bridge*, 11 Pick, 189.

In the present case, the testimony of one of the jurors is, that after the cause had been closed, and before the charge of the court, he met William J. Smith, one of the plaintiff's witnesses, in the basement of the Mortimer House, and there had a conversation with him relative to the case on trial. The juror says that he don't recollect all that Smith said, but what he does recollect is, that the witness said he had lost a great deal of money by the operation, speaking of the long case. He afterwards testifies, on cross-examination, that Smith was complaining about the length of time he was kept away from his home. This is all that he can recollect. The juror admits that he commenced the conversation with Smith, and yet he says that he did not wish to talk with any one about the case. In another place he says he does not recollect what was said about the cause. The juror's evidence is unsatisfactory, confused, and conflicting. His conduct is open to censure, and must be condemned. The practice of jurors talking about causes which they may be called to determine, is not only highly reprehensible, but contemptuous, and subject to admonition. Jurymen should be *omni exceptione majores*, and, as the Supreme Court say, "*their minds should be as white paper*" with reference to the cause they are trying. But when a verdict is sought to be set aside, it must be on other ground; their misconduct is not, in itself, a sufficient reason for a new trial, unless occasioned by the prevailing party, or some one on his behalf, or by his arrangement (*Pettibone vs. Philips*, 13 Conn. 445,) or there must be some bias or prejudice created, and the evidence of it should be full and clear: *Stone vs. The State*, 4 Humph. 27; *Mullen vs. Cottrell*, 41 Miss. 291.

In *McCausland vs. McCausland*, 1 Yeates, 372, the court held, that where a juror betted on both sides of the case, and declared previously his opinion in favor of the plaintiff, though his conduct was highly censurable, no bias was shown, and the expression of opinion was a subject of challenge, and a new trial was refused: see, also, *McCorkle vs. Binns*, 5 Bin. 340.

In *Blaine vs. Chambers*, 1 S. & R. 169, it is held, that it is gross misconduct for any person to speak to a juror, or for a juror to permit conversation concerning the cause after he is summoned and before verdict. There the brother-in-law of the lessor of plaintiff conversed with one of the jurors concerning the cause, *before and after he was sworn*. It was contended that the plaintiff was guilty of no misbehavior, and should not be affected by the misconduct of another, and that the court will not grant a new trial, *except for the misbehavior of a party: Grovenor vs. Fenwick*, 7 Mod. 156; *George vs. Pierce*, 7 Mod. 31. Judge Yeates held "*that the person who attempted to labor the jury merited the most severe punishment, as such conduct poisons the first source of justice.*" But, as the verdict was conformable to the justice of the case, a new trial was denied.

In *Ritchie vs. Holbrooke*, 7 S. & R. 458, a verdict was set aside for improper conduct of the plaintiff with the foreman of the jury, for in such case the court will not stop to inquire whether the juror was influenced or not. See, also, *Fenten vs. Den*, 4 Harr. 76; and in *Cowperthwait vs. Jones*, 2 Dallas, 56, the court say when the conversation is not with the party, there must be a *reasonable* certainty that *actual and manifest injustice* is done. So a verdict will not be set aside for a juror's misconduct, unless it is prejudicial to one or the other of the parties: *Crane vs. Sayre*, 1 Halsted (N. J.) 110; *Harrison vs. Price*, 22 Ind. 165. It furnishes no legal ground for disturbing a verdict that one of the jury has been tampered with, unless the act complained of be done by one of the parties or his agent, or by his consent and management: *Bishop vs. Williamson*, 2 Fairfield (Me.), 495. Verdicts ought not to be set aside on account of loose expressions of one, or even of a few of the jury thrown out casually and without being fully understood and explained: *Lamb vs. Saltus*, 3 Brevard, 130; *Stewart vs. Small*, 5 Mo. 525; *People vs. Boggs*, 20 Cal. 432; *Hudson vs. State*, 9 Yerger, 408; *Shea vs. Lawrence*, 1 Allen, 167; *White vs. Wood*, 8 Cushing, 413; *Wiggin vs. Coffin*, 3 Story, 1. The weight of authorities is as stated, but there are some decisions against this view. See *Durfee vs. Eeeland*, 8 Barb. Sup. Ct. 46. Where the jurors talked with bystanders, before rendering their verdict about the cause; that it was a lengthy suit, an expensive litigation, and about the value of the land, it was held misconduct on the part of the jurors, but not of a nature to set aside the verdict: *Hager vs. Hager*, 38 Barbour, 92, and authorities cited by the court. Where a juryman said to a witness of the plaintiff that "they would throw the costs upon the defendant, of course," and the witness said, "they could, of course," and the verdict was for the plaintiff, on motion for a new trial it was held, that although such conduct was a violation of the juror's public duty, yet it showed no bias or prejudice, and was not sufficient to grant a new trial: *McIlwaine vs. Wilkins*, 12 N. H. 474; *Pettibone vs. Phelps*, 13 Conn. 445. Though the rule is the

same in civil and criminal trials (2 Graham and Waterman on New Trials, 416), yet more leniency is exercised in the latter. See also *State vs. Andrews*, 29 Conn. 100; 2 Graham & Waterman on New Trials, 480 to 491. As the conversation of the juror was not with the plaintiff, but with the witness, and as it is admitted by the counsel for the defence that it produced no improper influence, it furnishes no cause for setting aside the verdict, under the authorities just cited.

4. Was there error, of which the defendant can complain, in allowing the record in bankruptcy to go out with the jury containing some depositions relative to the bankruptcy, and which the defendant had unsuccessfully endeavored to get before the jury?

The whole record was offered and received in evidence to establish the bankruptcy of E. W. Zeigler, through whom the plaintiff claimed by deed from his assignee. This was absolutely necessary for his case.

On a former trial of this very cause, only a portion of the record was offered in evidence, and because it was not certified as full and entire, it was ruled out at the instance of the defendant, and the plaintiff suffered a nonsuit. Now it is full and entire, and the objection is, that it contains foreign matter, improper for the jury to take out with them. The record could not be divided without mutilating it, and entirely destroying its validity. There was no prayer by the defendant to expunge the foreign matter, and if there had been it is doubtful whether the court could cut up the record, and send out only a part. It must be the whole record or none. If we were to disturb the verdict for that reason, now, our rulings would not only be inconsistent but haphazard. This is our reason why the whole record is evidence. Now for the authorities: The rule in Pennsylvania is, that all papers given in evidence during the trial of the cause, *except depositions*, are to be sent out with the jury: *Hendel vs. The Turnpike*, 16 S. & R. 97; *White vs. Bisbing*, 1 Yeates, 400; *Alexander vs. Jameson*, 5 Binney, 238; *Hamilton vs. Glenn*, 1 Barr, 342; *Mullen vs. Morris*, 2 Barr, 85; *Carson vs. Watson*, 4 Philada. Rep. 88; 1 Troubat & Haley, 578; *Iron and Coal Co. vs. Rogers*, 15 P. F. S. 416; *Taylor vs. Sorsby*, 1 Walker, 97; *Odd Fellows' Hall vs. Masser*, 12 Harris, 507; 2 Graham & Waterman on New Trials, 331 to 335. But a written statement filed during the trial should not be given in evidence or go out with the jury: *Bellas vs. Lloyd*, 2 Watts, 401; *Hamilton vs. Glenn*, 1 Barr, 340. But in the present case the depositions were attached to the record, and could not be separated, and *ex necessitate rei*, if the record be evidence at all, the jury are entitled to the whole record.

The objection that it contains foreign matter, irrelevant to the issue, is applicable to other papers. Thus, a deed having a description of the property in dispute, may also contain descriptions of other land. Books of original entries given in evidence frequently do contain other accounts. The exemplification of a record of judgment is evidence which a jury may have, although there may be some irrelevant matter in it: *Schuylkill and Dauphin vs. Jones*, 8 P. F. S. 304; *Alcott vs. Boston Steam Mill Company*, 11 Cushing, 91. In none of these instances is it improper for a jury to examine the papers. Where a jury, by mistake, took out with them a deposition, part of which was inadmissible, but that part was irrelevant and immaterial to the issue, it was not a suf-

ficient ground for a new trial: *Lonsdale vs. Brown*, 4 W. C. C. Rep. 148; 2 Wharton's Dig. 532, §881. Where the question is, as to the ownership of goods, it is no objection to admit a printed catalogue of goods to go to the jury that certain of these had been marked by the plaintiff as his property: *Striker vs. McMichael*, D. C. 7 Legal Int. 154. So, in an issue in the Orphans' Court to try who were the heirs of John Alexander, deceased, a manuscript book found in the trunk of the deceased was offered in evidence, and allowed to go out with the jury, and it was held that there was no distinction between sealed and unsealed instruments in this respect: *Alexander vs. Jameson*, 5 Binn. 238. In *Insurance Co. vs. Sennett*, 5 Wr. 161, the schedule, statements and affidavits, not being evidence of loss, they could not be read or sent to the jury; and in *The Marine Insurance Company vs. Hodgson*, 6 Cranch, 206, *ex parte* depositions taken in another case were not evidence for a jury. But where a record is given in evidence without objection to the court and jury, it is error to refuse to permit it to go out with the jury: *Hendel et al. vs. Turnpike Road*, 16 S. & R. 92. In an action for malicious prosecution, it was held proper to send out with the jury the information made by the defendant. Gibson, Chief Justice, says: "That document was not a deposition, but an indispensable part of the case in evidence by the plaintiff himself, and as such it does not fall within the rule which excludes a deposition from the jury room." *Seibert vs. Price*, 5 W. & S. 440.

In *Sholly vs. Diller*, 2 Rawle, 177, it was decided that a paper purporting to be a will, and the probate and letters attached, "if they were properly admitted in evidence, they were competent for the jury to take out with them, but were that otherwise (the court say), it is not a ground to disturb the verdict, as was intimated in *Alexander vs. Jameson*, 5 Binn. 238, and directly decided in *McCully vs. Barr*, 17 S. & R. 445." In that case, the depositions of witnesses to the will were attached to the record, and were allowed to go out with the jury.

In *Spence vs. Spence*, 4 Watts, 168, Chief Justice Gibson uses this language: "Ordinarily, depositions are not sent out with the jury, because the testimony of witnesses examined at the bar cannot be sent, and to put the testimony of those examined previously on any other footing would give it an unfair advantage. But, according to *Sholly vs. Diller*, 2 R. 177, depositions taken before the register, standing not upon ordinary footing, as was said in *Ottinger vs. Ottinger*, 17 S. & R. 142, may be sent out as part of the proceedings."

In addition to the authorities cited (which, in our opinion, rule this case), we would say, that as there is much in the discretion of the court as to refusal to permit papers to go out with the jury (4 Watts, 165; 1 Barr, 340; 10 Wright, 389; 7 P. F. S. 142), it is the duty of counsel to draw the attention of the court at the time, to papers, records and items in statements, that are objectionable, to go out with the jury.

In *Kline vs. Gundrum*, 1 Jones, 253, the Supreme Court say: "Counsel have duties to perform as well as courts" If this be not done when papers go out, the judgment will not be reversed. See also 2 Graham & Waterman on New Trials, 655 to 664; *Terry vs. Drabensstadt*, 18 P. F. S. 404; *Hall vs. Rupley*, 10 Barr, 231; *Maynard vs. Fellows*, 43 N. H. 255. And when a deposition was taken out with the knowledge of the complainant, a new trial was not granted: *Shields vs.*

Guffey, 9 Iowa, 322; *State vs. Delong*, 12 Iowa, 453. But what is conclusive of this matter is, that the defendant complains of error in allowing the jury to take out depositions *which he himself offered and failed to get in evidence*. This certainly was not error of which he can complain (*Unangst vs. Kraemer*, 8 W. & S. 391), and the mere statement of the objection is its own refutation.

Rule discharged.

[Leg. Int., Vol. 31, p. 286.]

C. R. DONOUGH *vs.* JOHN BOGER, JOHN MOODY AND PHILIP STEINBACH.

1. In a suit against three drawers of a joint promissory note, where there has been service of the writ upon two only, a copy of the note and a mere statement filed are sufficient to entitle the plaintiff to judgment against those served—under the 5th section of the act of March 21, 1806.
2. The notice required to be given by surety to a principal in order to discharge him from undoubted legal liability should be clear and explicit to proceed and collect the debt.
3. The notice should be given after the maturity of the note, and reasonable time to proceed should be allowed, and the affidavit should state with certainty all the material facts required.

Rule for judgment for want of sufficient affidavit of defence. Opinion delivered *March 30, 1874*, by

WALKER, J.—Philip Steinbach, one of the defendants in the above case, in his affidavit, assigns two reasons why judgment should not be entered against him:

1. On account of the insufficiency of the pleadings.
2. That being a surety on the note he is discharged from liability.

As to the insufficiency of the statement, it is urged, that the action and pleadings are joint against all three defendants, while the return shows that service of the writ was made only upon Moody and Steinbach, and therefore the plaintiff cannot take judgment against the two served, unless there be an averment in the narr that the process was issued against the other who was not found. See *Troubat & Haly*, vol. 2, page 618, formula under note 6; *Latschaw vs. Steinman*, 11 S. & R. 357; *Boaz vs. Heister*, 6 S. & R. 18. Under the 5th section of the act of 21st of March, 1806, Purdon's Digest, 1166, pl. 10, a copy of the note and a mere statement has been held sufficient to take judgment: *Morgan et al. vs. Bank*, 3 Pa. Rep. 391; *Clark vs. Dotter*, 4 P. F. S. 215.

Since the passage of the act of April 6, 1830, Purdon's Digest, 1120, pl. 4, P. L. 277, in suits brought against joint and several promissors or indorsers of promissory notes in which the writ has not been served on all the defendants, and judgment obtained against those served, such judgment shall not be a bar to recovery in another suit against those not served: see also act of April 11, 1848, P. L. 536; *Swansey vs. Parker*, 14 Wt. 441; *Bowman vs. Kistler*, 9 Casey, 106; *Miller vs. Reed*, 3 Casey, 244; *Coughenour vs. Suhre*, 21 P. F. S. 465; *Moore vs. Hepburn*, 5 Barr, 399; *Wickel vs. Long*, 5 P. F. S. 238.

A plaintiff may therefore proceed under the ancient form by declaration, or under the new form by statement, as he pleases: *Boas vs. Heister*, 6 S. & R. 20, per Duncan, J.

We therefore think the statement filed is sufficient. If it were not it could be amended on motion.

The second point is, that the surety is discharged through the negligence of the plaintiff to commence suit against the principal.

The law is well settled that when the surety desires to be released from liability it is his duty to notify the creditor in an explicit manner to proceed and collect the debt, and upon failure or neglect of the creditor, a court of equity will grant relief: *Cope vs. Smith*, 8 S. & R. 110; *Peter Kellar's Estate*, 1 Legal Chronicle, 189; *Erie Bank vs. Gibson*, 1 Watts, 143; *Johnston vs. Thompson*, 4 Watts, 446; *United States vs. Simpson*, 3 Pa. Rep. 437; *Pain vs. Packard*, 13 Johns. 174; *King vs. Baldwin*, 17 Johns. 381; American Leading Cases, vol. 2, 362 to 480, and notes; *Commonwealth vs. Wolbert*, 6 Binney, 292; *Wetzel vs. Sponsler*, 6 Harris, 460; *United States vs. Samuel*, 4 Wash. 620; *Strickler vs. Burkholder*, 11 Wr. 476; *Richards vs. Commonwealth*, 4 Wr. 146; *Shimer vs. Jones*, 11 Wr. 268; *Railway Co. vs. Shaeffer*, 9 P. F. S. 350; *Wolleshlare vs. Searles*, 9 Wright, 45; *Hoffman vs. Bechtel*, 2 P. F. Smith, 190; *Sisson vs. Barrett*, 6 Barb. 199; *Gardner vs. Ferres*, 15 S. & R. 28; *Conrad vs. Foy*, 18 P. F. S. 381.

The affidavit sets forth that the note in question fell due April 2, 1873, and that suit was not instituted until May 31, 1873, and after John Boger, the principal, left the county.

It further avers, that "at or about" the time of the maturity of the note, Steinbach told plaintiff that Boger, the principal, had in his possession "property and money" sufficient to pay the note, and that unless plaintiff would instantly proceed against Boger, he would consider himself discharged. It further avers that Steinbach was a surety of Boger, and that was known to the plaintiff.

1. Under these circumstances, did the delay of plaintiff to proceed against the surety after notice discharge him from liability?

2. Is this notice sufficient?

As a general rule, we think that a creditor, after receiving proper and explicit notice from the surety to sue the principal, should do so at the next court if there is a reasonable time intervening, and nothing to prevent, and should act promptly in obtaining judgment. He would not be required to arbitrate the case unless requested by the surety, or the circumstances of the case clearly required it: *Wetzel vs. Sponsler*, 6 Harris, 460.

After the note fell due, the next term of court was in June, 1873, and the last day for issuing writs to that term was on May 23, 1873. With promptness the plaintiff could obtain judgment in June, if there was a service and no appearance, and this would be proper despatch in the absence of any extraordinary circumstances.

In the present case the plaintiff did not issue his writ until the 31st of May.

To discharge the surety he should show that a service could have been made upon Boger between the 23d and 31st of May, and that he was injured by this delay. The affidavit is silent upon this point, except that it avers that during a portion of the time between the 2d of April and 31st of May, 1873, Boger was within the jurisdiction of the court. What portion of the time? Was it a day or so in the beginning of April? If this was the case, the greatest despatch of the plaintiff might not reach him with a service. Again, it is not averred that Boger

was in the county when and after notice was given. If he was not in the county after notice, *how is the defendant prejudiced?*

And even if he had a service, the affidavit does not state that Boger had any real estate in the county that would be bound by a judgment. The affidavit should state all material facts clearly and with precision, not in a vague and doubtful manner. The courts incline to scrutinize an affidavit, and justly so, before they discharge a surety from his legal obligation.

In *Conrad vs. Foy*, 18 P. F. Smith, 385, Judge Agnew says: "Why should a surety, bound in a solemn bond or note in writing to pay a debt, which his credit enabled his principal to create, be discharged therefrom except upon the clearest equity? and why should the written obligation be blown away by the uncertain breath of witnesses? A notice from a surety to the creditor to proceed against the principal or otherwise the surety will be discharged, ought in justice to be in *writing*, and in the most explicit terms. But prior decisions have not required this, and we cannot legislate such a rule into existence."

We have a right to hold, and justice requires us to say, that nothing less than clear and positive proof of the notice given by persons duly authorized to give it, and a notice clear and explicit in its terms, *given at a time when* the creditor has it in his power to proceed to collect the debt, should discharge the surety from an undoubted legal obligation to pay the debt: see *Wolleshlare vs. Searles*, 9 Wr., page 45.

Again, this affidavit further states, that the notice was given "*at or about*" the time of the maturity of the note.

If the notice was given before the note matured, it would be in operation: *Hellen vs. Crawford*, 8 Wr. 105.

The notice must be given after the note matures, and the affidavit should explicitly aver that fact. The words "*at or about the time*" may mean before its maturity, or they may mean after the maturity. They are uncertain, and therefore insufficient where the time is material.

We do not presume that the defendant can prove before a jury any more than he set out in his affidavit, and therefore if he did not, the court would be bound to instruct the jury that unless the defendant showed that notice was given after maturity of the note it would not avail him: *Black vs. Halstead*, 3 Wr. 71.

The rule for judgment is therefore made absolute.

[Leg. Int., Vol. 31, p. 349.]

HUGHES vs. GALLANS.

The contracts of an infant at common law cannot be enforced except for necessities. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages.

Motion for new trial. Opinion delivered by

WALKER, J.—The evidence in this case was that the defendant employed Patrick Christopher Hughes, a small boy, to drive horses for him attached to his boat on the Schuylkill Navigation canal, during the summer of 1871. The wages of the boy the defendant refused to pay, and suit was therefore brought by his next friend, James Hughes.

It appeared on the trial that Thomas Gallans, the defendant, was also

a minor under the age of twenty-one years, and this was the ground of the defence, the contract not being for necessities furnished. The court, upon the request of the defendant, instructed the jury, that if the defendant was a minor at the time the contract was made and the services were performed, the plaintiff could not recover.

Was there error in this?

No doubt this is a case of hardship—but the hardship of special cases has, it is said, run away with the law—and it has been found a dangerous expedient to fritter away a principle to sustain an exception.

The contracts of an infant at common law cannot be enforced except for necessities: 1 Blackstone Com. 466, and notes by Judge Sharswood; *Curtin vs. Patton*, 11 S. & R. 305; *Clemson vs. Bush*, 3 Binney, 413; *Penrose vs. Curren*, 3 Rawle, 351; *Sliver vs. Shelback*, 1 Dallas, 165; *Brown vs. McCune*, 5 Sandford, 228; 1st vol. American Leading Cases, 307; 2d vol. Smith's Leading Cases, 653—5th Amer. Ed.; *Norris vs. Vance*, 3 Richardson, 164; *Conroe vs. Birdsall*, 1 Johns. 127; *McGinn vs. Shaeffer*, 7 Watts, 412.

And this is so, even though he represented himself to be of age: *Burley vs. Russell*, 10 New Hamp. 184; *West vs. Moore*, 14 Vermont, 447; 1 Blackstone Com. 466. See Adams' Equity, 362, and notes.

Legal incapacity cannot be removed by fraudulent misrepresentation, nor can there be an estoppel involved in the act to which the incapacity relates: *Keen vs. Coleman*, 3 Wr. 299.

Infants are liable for their torts: *Bullock vs. Babcock*, 3 Wend. 391; *Vasse vs. Smith*, 6 Cranch, 226. But not when the contract is stated as an incident of a supposed tort: *Wilt vs. Welsh*, 6 Watts, 9; *Keen vs. Hartman et ux.*, 12 Wr. 497.

Infants are liable for necessities: *Rundel vs. Keeler*, 6 Watts, 237; *Commonwealth vs. Hantz*, 2 Pa. Rep. 333; 1 American Leading Cases, 300 to 303, and notes.

The term necessities is a relative one—and what are necessities, must be determined by the age, fortune, condition and rank in life of the infant: 1 Black. Com. 466, and note 14 (Sharswood's ed.)

Moneys loaned for repairs are not necessities: *West vs. Gregg*, 1 Grant, 53. And there may be no recovery for necessities—when the infant has a guardian: *Guthrie vs. Murphy*, 4 Watts, 80; *Wailing vs. Toll*, 9 Johns. 141; *Angel vs. McLellan*, 16 Mass. 28.

And in an over-supply a tradesman acts at his peril: *Johnson vs. Lines*, 6 W. & S. 80.

Whether the person be a minor or not is a question for the jury: 1 Black. Com. 466, and notes; 1 M. & S. 738.

And in doubtful cases it is better to admit the evidence and judge of its effect afterwards: *Allen vs. McMaster*, 3 Watts, 181.

Though an infant therefore be not liable for his contract, he is nevertheless answerable in an action on the case for damages: *Fitts vs. Hall*, 9 New Hamp. 441; *Wallace vs. Morse*, 5 Hill, 391.

The rule is therefore discharged.

[Leg. Int., Vol. 31, p. 406.]

SCHRADER vs. BURR.

The act of April 9, 1872, "for the better protection of the wages of mechanics, miners, laborers and others," does not give a lien for wages earned after the particular property has been seized by the sheriff on an execution. Property levied is in the custody of the law, and when sold the proceeds are preserved against lien creditors subsequent to the levy.

When a mechanics' lien which is defective has been filed, and the property against which it is entered is sold by the sheriff before the expiration of the six months allowed by law for filing the lien of a mechanic, the claim may be made upon the fund with the same effect that it could be made, if a lien sufficient in form and substance had been entered of record before the sale.

In the matter of the exceptions to the report of D. E. Nice, auditor. Opinion delivered December 7, 1874, by

PERSHING, P. J.—An act of assembly was passed on the 9th day of April, 1872, "for the better protection of the wages of mechanics, miners, laborers, and others;" (P. L. 47.) The first section provides, *inter alia*, that all moneys due for labor and services rendered, by any miner, mechanic, laborer or clerk from any person or persons, or chartered company, either as owners, lessees, contractor or under owners of any works, mines, manufactory or other business, where clerks, miners or mechanics are employed for any period not exceeding six months immediately preceding the sale and transfer of such works, mines, manufactories or business, or other property connected therewith in carrying on said business, by execution or otherwise, preceding the death or insolvency of such employer or employers, shall be a lien on said mine, manufactory, business or other property, to the extent of the interest of said owners or contractors as the case may be, in said property, and shall be preferred and first paid out of the proceeds of such mine, manufactory, business or other property as aforesaid; such preferred claim not to exceed two hundred dollars.

The fund in court for distribution arises from the sheriff's sale of the personal property of F. A. Burr, consisting of the *Standard* printing establishment. On the 6th of April, 1874, a rule was granted by the court to show cause why the writ of *fi. fa.* should not be set aside, which rule, after argument, was discharged. Following this were two sales of the property. The purchaser at the first sale having failed to comply with his bid, the second sale was made on the 18th of July, 1874.

It appears that after the sheriff made his levy the publication of the *Daily and Weekly Standard* was continued for some time by F. A. Burr, the defendant in the execution. The claims for wages presented to the auditor were made on the part of those employed on these newspapers between the date of the levy and day of the sale. The labor was performed within the six months immediately preceding the sale of the property, and it is claimed that the wages thus earned are preferred liens within the very language of the act of April 9, 1872. This construction, it was argued, is strengthened by a comparison of this act with that passed on the 11th of April, 1862, for the protection of the wages of labor in the counties of Schuylkill, Bedford and Blair. This latter act, section 5, is made to apply to "wages of labor done and performed within six months immediately preceding the assignment, death or levy

by execution, mentioned therein." It will be observed that in the act of 1862, the six months within which the wages of labor are preferred, in a case such as the one before us, are reckoned from the date of the levy; in the act of 1872, the date of the sale is the point of time from which the six months are to run. Was it in the contemplation of the Legislature in passing the act of 1872, to allow liens to accumulate against personal property after it had been levied upon, with the result, in many instances, of sweeping away the proceeds of a sale from vigilant and meritorious execution creditors? It is a familiar rule of construction, that the real intention will always prevail over the literal sense of terms, especially when adherence to literal terms would lead to palpable injustice, contradiction and absurdity. There is no evidence that Mr. Schrader agreed to, or was in any way a party, to the use of the printing establishment by Mr. Burr, after it had been seized by the sheriff. If the broad construction claimed for the act of 1872 is the true one, it is plain that an execution creditor upon whose writ a levy has been made of property abundantly sufficient to satisfy his judgment, may yet realize nothing, in consequence of the interposition of liens created after the property was in the custody of the law. Without reference to the words "by execution or otherwise preceding the death or insolvency of such employer or employers," we think the preference given to the wages of labor under the act of 1872, cannot be extended to a time subsequent to the date of the levy. This construction, it seems to us, is alike consonant with reason and authority. The return of the sheriff established beyond controversy that he had seized the property and taken it into his own possession. A sheriff's levy necessarily disturbs the possession of the owner of the goods levied upon. It is a seizure. It cannot be made in Pennsylvania without having the goods levied upon, in actual manucapture or control. It vests the possession so fully in the sheriff, that he may maintain trespass for any disturbance of it; and of course it divests the possession of the owner. Even the owner himself may become a trespasser against the sheriff, by removing the goods from his control: *Welsk vs. Bell*, 8 Casey, 15. The very point before us has been disposed of in a few sentences in the case of *Glass vs. Gilbert*, 8 P. F. S. Chief Justice Agnew says (page 288): "Property levied is in the custody of the law, the end of which might be defeated if creditors could subsequently acquire a paramount interest in it. It was therefore held that a treasurer's warrant to the sheriff to sell the lands of a delinquent collector of taxes created a lien by seizure, which not only justified the sale, but preserved the proceeds of sale against lien creditors subsequent to the levy."

We think the auditor committed no error in excluding claims for labor, which was performed subsequent to the time of the levy by the sheriff, from participation in the fund for distribution.

Another controverted question involved in the report of the auditor grows out of a mechanics' lien filed by Pott & Vastine against F. A. Burr. When the hearing was had before the auditor, a rule was pending in court to show cause why this lien should not be stricken from the lien docket. This application was based on the decision of the Supreme Court in the case of *St. Clair Coal Co. vs. Martz*, 2 Legal Chronicle, 89. The auditor has made his report in the alternative, one distribution

including this mechanics' lien, the other excluding it. It is too plain to admit of argument that the decision in *St. Clair Coal Co. vs. Marts*, is fatal to the lien as filed. It does not necessarily follow that Pott & Vastine cannot come in upon the fund. On the day of the sale they gave written notice of the amount they claimed as a lien on the press, engine, boiler and gearing, thus limiting it so as to avoid the legal objections to the lien as filed. Independent of their filing any paper, the statute gave a lien which had not expired when the sheriff's sale was made. If the claim filed be defective, the filing of it does not exhaust or affect the lien, which exists independently of it, till the six months have expired. A second, third, or fourth claim may be filed, and no prior one can be pleaded against the last. The means given to mechanics and material men, are not exhausted by an abortive attempt to pursue the directions of the statute, by filing the claim within six months. This is but the mode of giving it fruitful effect; and should it fail from some technical or even substantial defect, the lien is no more destroyed, than would be a bond, sued out by an improper or inappropriate writ. The claim still remains, and so does the lien, until barred by the lapse of six months after the work is finished or materials furnished. To hold otherwise might be attended not only by inconvenience, but gross injustice—a hazard which no analogy in the law calls upon us to encounter, and against which we are admonished by the frequent failures of these recorded claims upon merely formal grounds, or because of the want of the due observance of the statutory requisitions: *Bournonville vs. Goodall*, 10 Barr, 133; *Chambers vs. Yarnall*, 3 H. 265. Where the property is sold at sheriff's sale before the expiration of the time allowed by law for filing the lien, the claim may then be made upon the fund, with the same effect as it could be made against the building if the claim had been entered of record before its sale: *Yearsley vs. Flanigen*, 10 H. 489.

This disposes of the only objection made to the payment of this lien, in the proceedings before the auditor.

T. P. Trayer, Esq., the assignee in bankruptcy of F. A. Burr, excepts, because the auditor refused to charge Mr. Schrader with the difference between his bid at the first sale, and the amount at which the property was knocked down to him at the second sale. The legal liability of Mr. Schrader must be ascertained by a different proceeding, and we think the auditor very properly refused to entertain the proposition.

That distribution made by the auditor which includes the payment of the mechanics' lien of Pott & Vastine is confirmed, and all exceptions in conflict with this decision are hereby overruled.

Supreme Court of Pennsylvania.

JUSTICE vs. ROWAND.

A person who is not licensed to act as a broker may, nevertheless, maintain an action for a commission earned in the sale of arms.

The act of assembly imposes a penalty of five hundred dollars for acting as a broker without a license, but this fact will not prevent a party from recovering in a particular case, wherein he has acted as an agent for another, on a contract for a commission for services rendered, in effecting the sale of a lot of arms.

(Certificate from Nisi Prius, No. 174, of January Term, 1863.)

This was an action on the case, to recover a commission alleged to have been earned by the plaintiff in effecting the sale of a lot of arms to the United States government. The defendants, P. S. Justice & Co., were manufacturing and selling arms, and the plaintiff charged that he had been employed by them, as agent, to effect a sale of a lot of arms as aforesaid; and that they had agreed to pay him a commission of five per cent. for his services. That he did sell the arms, and had earned his commission, but the defendants refused to pay the same. He therefore brought suit to recover, setting forth substantially the above facts in a special count; also adding the common count. To this the defendants filed the ordinary short pleas, and a special plea, setting forth that plaintiff had paid no license as a broker, and was not authorized by law to act as such, and could not recover a commission for such services, the same being exercised contrary to law.

On the trial of the cause, the learned judge (Thompson, C. J.) reserved the point of law raised by the defendants' special plea, and the jury found a verdict for the plaintiff for \$1441.81.

Subsequently, on the 4th day of April, 1868, the court ordered judgment to be entered on the verdict in favor of the plaintiff on the point reserved. (See App. Docket, page 416.)

Whereupon the defendants caused the case to be certified into the Court in Banc.

January 14, 1869, Thompson, C. J., delivered the opinion of the court, affirming the judgment at Nisi Prius. Holding that though the plaintiff was not licensed to act as a broker, he might still maintain an action for the commission alleged to have been earned by him under his contract with the defendants. That even if he had made himself liable to the penalty of five hundred dollars imposed by the act of assembly, the fact could not be made available here by the defendants to prevent a recovery on plaintiff's agreement with them.

[The District Court seem to have arrived at a different conclusion: see *Costello vs. Goldbeck*, Briggs, J., 30 Legal Intelligencer, 108; but in the Supreme Court case there seems to have been a special contract.]

Samuel G. Thompson and *George Bull*, Esqs., for the plaintiff.

A. S. Letchworth, Esq., for defendants.

NOTE.—See also *Shepler vs. Scott*, 4 Norris, 329.

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ACCOUNT.

An account rendered becomes an account stated if not objected to in a reasonable time. Four months held in this case to be such an unreasonable time as to amount to an estoppel. *Colket vs. Ellis*, 375.

ACTION. See TRESPASS. REPLEVIN. MALICIOUS PROSECUTION. ARBITRATION.

1. Plaintiff after obtaining judgment against the husband is estopped from bringing another action for the same cause against the husband and his wife. *Butcher vs. South et ux.*, 104.

2. An action for infringement of a patent survives against an administrator. *Smith vs. Baker's Administrators*, 221.

3. When several different forms of action will lie in any particular case, as assumpsit, trespass, or trover, each having a separate scope in respect to the measure of damages not identical with either of the others, and a plaintiff makes choice of the one under which he will proceed, it becomes the duty of the court to see that the latitude of damages appertaining in the particular form of action chosen, be neither abridged nor enlarged. *Garrison vs. Bryant*, 474.

4. When property has been wrongfully taken and converted, and the owner brings *assumpsit*, though either trespass or trover would lie, also, he not only waives all right to recover damages for the tortious taking and conversion of the property, but he subjects himself to the consequences of having his demand considered as a *debt*, against which the defendant may set off any counter demand he may have against the plaintiff. *Id.*

5. If *trespass* be brought in such a case, the plaintiff may recover as well the value of the property, as damages for the tortious taking and malicious conversion of it; and the measure of damages is for the jury, under the facts as developed by the evidence. *Id.*

6. But, if out of the three forms of action thus open to him, the plaintiff selects *trover*, his recovery will generally be limited within the ordinary scope of that action, namely, the value of the property at the time of its conversion, with interest; though where its value has in some way been enhanced by the wrong-doer, if its identity has been preserved, the damages may be increased to correspond with such enhanced value, and interest. *Id.*

7. In an action of *trover*, the *quantum of damages*, according to the rules of law, is to be ascertained by the jury; the *rule of damages* is a pure question of law, not to be submitted to the discretion of a jury. *Id.*

8. The legal remedy for disturbance of a right of way is an action of trespass on the case. *Jones vs. Park*, 165.

9. Where several remedies are given, the party entitled to them may select that which is best calculated to serve his ends. *Morris vs. Hancock*, 571.

ACTS OF ASSEMBLY, considered and construed.

- 1772, March 21. LANDLORD AND TENANT. *Ins. Co. vs. De Coursey*, 88.
- 1803, " 24. TURNPIKE. *In re Turnpike Co.*, 59.
- 1810, " 20. JUSTICES. *Long vs. Shelly*, 506.
- 1818, Jan. 29. BOARD OF HEALTH. *Eddy vs. Board of Health*, 94.
- 1821, March 15. HORSE THIEF. *Comm. vs. Edwards*, 215.
- 1832, " 15. REGISTER'S COURT. *Comm. vs. Clarke*, 419.
- 1839, July 2. ELECTIONS. *In re Barber*, 579.
- 1840, April 14. TURNPIKE. *Simons vs. Turnpike*, 101.
- 1841, May 4. TAX. *Barton vs. Morris*, 360.
- 1845, April 26. NEGLIGENCE. *Stein vs. Railway*, 440.
- 1846, March 11. CLAIMS. *City vs. Esau*, 425.

- 1846, April 8. PUBLIC WORKS. *Railway vs. City*, 37, 70.
- ACTS OF ASSEMBLY—(Continued.)
- 1847, March 20. CORPORATIONS. *Comm. vs. Conover*, 56.
- 1848, April 11. MARRIED WOMEN. *Camp et ux. vs. Stark*, 528.
- 1849, Feb. 19. RAILROADS. { *Railroad vs. Lawrence*, 604.
 Railway vs. Railway, 75.
- 1851, April 14. JUDGMENTS. *Bright vs. Coal Co.*, 609.
- 1854, Feb. 2. TAXES. *Hancock vs. Thayer*, 25.
- " May 8. *Coal Co. vs. Curran*, 543.
- " 8. SCHOOLS. *Bouton vs. Royce*, 559.
- 1855, March 9. DIVORCE. *Pennington vs. Pennington*, 22.
- " April 21. STREETS. { *In re Perry's Court*, 27.
 City vs. Michener, 30.
- " May 7. BUILDING INSPECTORS. *Hancock vs. Thayer*, 25.
- 1856, March 17. CORPORATIONS. *Grubb vs. Manufacturing Co.*, 316.
- " April 9. " *In re Credit Mobilier*, 2.
- 1857, May 20. BUILDING. *Hurlburt vs. Firth*, 135.
- 1858, April 21. CITY CONTRACTS. *McGlue vs. City*, 348.
- 1863, July 18. CORPORATIONS. { *Young vs. Oil Co.*, 525.
 Bacon vs. Morris et al., 83.
- " Dec. 14. LANDLORD AND TENANT. { *Ins. Co. vs. De Coursey*, 88.
 Mortimer vs. O'Reagan, 500.
- 1865, March 23. TAXES. *Felty vs. Uhler*, 512.
- " 24. LANDLORD AND TENANT. *Ins. Co. vs. De Coursey*, 88.
- 1866, Feb. 23. TAXES. *Coal Co. vs. Curran*, 543.
- 1867, 20. " *Mortimer vs. O'Reagan*, 500.
- " March 21. MORTGAGE. *Wright vs. Vickers*, 381.
- 1868, April 14. FAIRMOUNT PARK. { *City vs. Railway*, 165.
 Comm. vs. Park, 445.
- " 14. STREETS. *In re Thirty-fourth Street*, 197.
- 1869, Feb. 18. BUILDING COS. *In re Building Co.*, 106.
- " March 17. SUMMONS ATTACHMENT. *Washburn vs. Baldwin*, 472.
- " 29. CRUELTY TO ANIMALS. *Comm. vs. Randall*, 451.
- " April 15. EVIDENCE. *Camp et ux. vs. Stark*, 528.
- " 21. } FAIRMOUNT PARK. *City vs. Railway*, 165.
- 1870, Jan. 27. } DELINQUENT TAXES. *McAfee vs. Bumm*, 157.
- " March 24. } LOCAL OPTION. *Comm. vs. Keenan*, 194.
- 1871, May 3. " LICENSE. *Comm. vs. Saal*, 496.
- " 21. " SURVEYS. { *Duhring's Appeal*, 181.
 In re Arch Street, 117.
- " 19. CORPORATIONS. *Lejee vs. Railway*, 362.
- 1872, March 6. LANDLORD AND TENANT. *Mortimer vs. O'Reagan*, 500.
- " April 4. ELECTIONS. *Bouton vs. Royce*, 559.
- " 9. WAGES. { *Schrader vs. Burr*, 620
 Bank vs. Childs, 452.
- " May 6. MONUMENT CEMETERY. *Naglee vs. City*, 121.
- " 28. FIRE COS. *Comm. vs. Fire Co.*, 393.
- 1873, March 13. DELAWARE AVE. *Fitzpatrick vs. Railroad*, 107.
- " June 21. GIRARD AVE. *In re Girard College*, 145.
- 1874, April 22. TRIAL. *Colket et al. vs. Ellis et al.*, 375.

ACTS OF CONGRESS, considered.

- 1839, Feb. 28. IMPRISONMENT FOR DEBT. *In re Thomas*, 82.
- 1864, April 29. SHIPPING. *French vs. The Victoria*, 292.

ADMIRALTY. See DEMURRAGE, 1, 2.

1. Where salvage services are performed merely by the permission of another wrecking company, which had possession of the vessel, and which services were rendered with the understanding that the wrecking company, and not the vessel, was to be responsible:—*Held*, that the vessel is not liable for such salvage services. *Baker vs. The Tros*, 223.

2. The rule of maritime law that a passenger who has no opportunity to leave a vessel in distress, cannot render a salvage service, may admit of a qualified exception where he has promoted her safety by an extraordinary and peculiar service which he was not compellable to render. But in admitting such an exception in

ADMIRALTY—(Continued.)

favor of a passenger, the greatest caution is necessary, and especially so where he is of the nautical profession. *Brady vs. S. S. Co.*, 283.

3. Where a passenger of the nautical profession who had rendered such service, afterwards assumed and exercised illegitimate authority over the vessel, though the circumstances were not such that he incurred an absolute forfeiture of the salvage compensation, its amount was nevertheless materially reduced by reason of such usurpation of authority. *Id.*

4. The *Hazel Dell* and *Victoria*—two sailing vessels close hauled and having the wind on different sides—were beating up a narrow inlet against a head wind, when a collision took place: *Held*, that by the 12th and 17th articles of the rules and regulations for preventing collisions (13 Stat. 58), it was the duty of the *Hazel Dell*—the wind on her port-side and being the overtaking vessel—to give way and to keep out of the way of the *Victoria*. *French vs. The Victoria*, 292.

5. That whilst by the 18th article the *Victoria*, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger. *Id.*

6. That the evidence brought the case within the principles of *The Muria Martin* (12 Wall. 31), and the damages, caused by the collision, should be divided equally between the libellant and respondent. *Id.*

7. A State court has no authority by a proceeding *in rem* to enforce a maritime contract. *Rutherford vs. The Ornen*, 369.

8. Pilotage is a maritime contract. *Id.*

9. The treaty of December 11, 1871, between the United States and the German empire, containing provisions which give to the consuls of the respective governments exclusive cognizance of differences of every kind arising between the captains and crews of vessels belonging to the respective countries, and enacting that the local tribunals shall not, on any pretext, interfere in these differences, it was *held*, that a sailor, who was a Hollander, who had shipped at Liverpool as a seaman, on board of a German ship, and who, upon the arrival of the ship in this port, had been arrested and handed over to the German consul upon a requisition made by him on a complaint preferred to him by the captain of the ship, could not maintain an action in this court against the captain for such arrest. *Meyer vs. Busson*, 414.

AFFIDAVIT OF DEFENCE LAW. See CONSTITUTIONAL LAW, 7.

1. A general allegation upon information in an affidavit of defence that another than the plaintiff owns the note in suit, is insufficient. The averment must be more specific as to the source and character of the information. *Gowen vs. McPherson*, 358.

2. Judgment entered against administrators, in a suit upon a contract of their decedent, for want of an affidavit of defence, is irregular and void, and will be stricken off on motion. *Wright's Executors vs. Cheyney's Administrators*, 469.

3. Judgment cannot be taken for want of a sufficient affidavit of defence where the plaintiff was dead at the time of the issuing of the writ, and the writ was not amended till after judgment day. *Lynch vs. Kerns*, 335.

ALDERMEN AND JUSTICES. See ATTACHMENT EXECUTION, 5, 6, 7, 8, 9, 10, 11.
CRIMINAL LAW.

1. Judgment taken before alderman on March 24, bail for appeal entered April 10, and the appeal not filed in court till May 3, held in time. *Lingerfield et al. vs. George*, 80.

2. In criminal trials before justices of the peace with a jury of six, their records must show in some reasonably intelligible form a case within their jurisdiction, and that all the elements of a fair legal trial have been observed, and that a definite and authorized judgment has been entered. *Comm. vs. Morey et al.*, 400.

3. A greater degree of precision is required in these criminal cases than in the ordinary civil cases that are tried before them. *Id.*

4. The law gives them jurisdiction in cases of larceny where the value of the property stolen does not exceed \$10, and it is error if they try a case where the property appears to be of the value of "about \$10." *Id.*

5. It is error if the property stolen be not charged to belong to some person, and if the place of the larceny be not stated. *Id.*

6. It is error if it do not appear that the jurors are electors in the township, borough or city, where the trial takes place. *Id.*

ALDERMEN AND JUSTICES—(Continued.)

7. How the proceedings are to be made up and certified in return to a *certiorari*. *Id.*

A *certiorari* in such cases cannot issue without a special allowance by the court or the district attorney. *Id.*

8. In such cases the Christian name of the defendant ought to be given and not merely the initial letter, and so the jurors ought to be named. *Id.*

On a charge of larceny against the defendants, made and tried before a justice of the peace, and brought up by the defendants by *certiorari*. *Id.*

9. A summary proceeding before a justice of the peace is in the nature of a criminal prosecution for a public crime or offence, and must be regulated by rules similar to those adopted by the common law in criminal prosecutions, the accused being acquitted or condemned by the decision of the person appointed by the statute for judge. *Comm. vs. Davenger*, 478.

10. The record of a conviction or judgment in such a case must show jurisdiction on the part of the magistrate; it must specify the ordinance violated; it must note a penalty imposed conforming precisely with the fine covered by the ordinance; it must show either that the defendant confessed the charge, or that it was made out by the proofs: that the witnesses were sworn or affirmed; that the commission of the offence was within the city or borough enacting the ordinance, and that judgment was duly entered. *Id.*

11. A judgment of a justice of the peace affirmed or reversed on *certiorari* is final, and execution can issue out of the Court of Common Pleas for the debt, interest and costs, when affirmed, and for the costs when reversed, under the act of 1810. *Long vs. Shelly*, 508.

12. The record need not be remitted to the justice except where the proceedings are non prossed. *Id.*

13. The act of May 24, 1871, by which a person in Mercer county may be tried and convicted before a justice of the peace and a jury of six persons for selling liquor without a license, is unconstitutional. *Comm. vs. Saul*, 496.

14. It is contrary to the bill of rights, which declares "that trial by jury shall be as heretofore, and the right thereof remain inviolate." *Id.*

15. When a defendant is summoned to appear at 1½ o'clock, it is error if the transcript sets forth that at 2 o'clock plaintiff appeared and defendant did not. *Smith vs. Fetherstone*, 308.

16. Where judgment has been entered by a justice against a defendant who was in default, but who, within twenty days, entered bail for an appeal which he neglected to bring into court, *certiorari* will not avail to set aside an execution subsequently issued, even though the service of the summons be shown by the record to have been defective. Taking the appeal amounts to a recognition that the case was regularly before the justice, and is a waiver of the defect which otherwise would have been fatal. *Jones vs. Canal Co.*, 570.

17. An agent may appear before a justice and take an appeal. The justice is the judge of the agent's authority, which, it must be presumed, was satisfactorily shown. *Id.*

APPEAL. See PRACTICE, 21.

Where upon appeal the recognizance is defective, as by reason of the want of a second surety, the appeal will not be stricken off, but the appellant will be permitted to perfect his recognizance. *A. D. Hummer vs. The Ephrata School District*, 494.

APPEARANCE. See PRACTICE.

ARBITRATION. See BANKRUPTCY. REPLEVIN. BANKRUPTCY, 16.

1. The act of April 6, 1870, must be so construed as to give it practical effect, and not to embarrass a reasonable administration of it, by sustaining critical exceptions on account of form, or time or manner of filing papers, notes of testimony and memoranda of proceedings. *Van Syckle vs. Stewart*, 547.

2. When a legal arbitrator fails to file all the papers of a case, the proper remedy is to apply to the court to have such defects supplied, and if necessary, for an enlargement of the time for filing proper exceptions. When this course is not pursued, an exception that all the papers were not filed will be sustained, particularly when all are on file before and at the time of hearing. *Id.*

3. The law provides two modes of correcting errors in proceedings under it: First, by motion to set aside the award: Second, by filing exceptions to the rulings and decisions of law. *Id.*

4. An exception that the legal arbitrator did not duly reflect upon the case, being insusceptible of proof, will be dismissed. *Id.*

ARBITRATION—(Continued.)

5. It is no ground for exception that the body of the award of the arbitrator is not written by himself, but by another hand. *Id.*
6. If a party alleges "failure of mental vigor" in the arbitrator, during the trial, he must apply to be relieved from the submission for that reason. After electing to take his chance, and an award against him, he cannot except on this ground. *Id.*
7. It is not "misbehavior" on the part of an arbitrator to use printed notes of testimony, not shown to be incorrect, furnished by one party, the other refusing to contribute to the expense of preparing them. *Id.*
8. An exception that a party used "undue influence" upon the arbitrator, without specification of the act or acts, and not proved, will be dismissed. *Id.*
9. Counsel have a right to withdraw points of law submitted to the arbitrator for his opinion in writing, before the award is made. It is unusual for one party to except because the points of the other are not answered. Such exceptions, if made, will be disregarded unless accompanied by specifications of some error in them, or the rulings or decisions of the arbitrator about them. *Id.*
10. An exception to the award of a legal arbitrator that it is "illegal in substance and form, and without law or evidence to support it," is merely an assignment of "general errors," and is of no value without proper specifications. *Id.*
11. The rule of law that, where parties to an executory contract appoint an arbiter to decide disputes which may arise under it, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, does not apply to a contract which forms the basis of a mechanic's lien. *Kreitlich et al. vs. Klein*, 486.
12. The ordinary covenant in such an agreement that the costs of any changes or additions to the building, or any other matter affecting the contract, shall be submitted to an architect, whose decision shall be final and binding on the parties, will not operate to exclude the mechanic or material-man from filing his lien under the mechanics' lien law. *Id.*

ASSIGNMENT.

1. An assignee may be charged in his second account with items received prior to the filing of his first account. *Truitt's Estate*, 16.
2. An assignee will be charged with interest on balances in his hands, where he has neglected to perform his duties faithfully. *Id.*
3. *Brown's Estate*, 8 Phila. Rep. 197, followed and approved. *Id.*
4. The inventory is *prima facie* evidence of the amount of the assignee's liability. *Id.*

ATTACHMENT. ACT OF 1869.

A defendant is entitled to the benefit of the exemption law in a proceeding commenced by attachment under the act of 17th March, 1869, if the original demand be founded on contract. *Washburn vs. Baldwin*, 472.

ATTACHMENT EXECUTION. See EVIDENCE, 6.

1. A garnishee in an attachment execution is not bound to answer irrelevant interrogatories. *Rhine vs. Railroad*, 336.
2. Horses and carriages kept at a livery stable are not subject to attachment execution against the livery stable keeper. They may be levied on directly. *Hall vs. Manufacturing Co.*, 370.
3. Judgment will be entered against a garnishee on the amount admitted in his answer to be due, although it became due after plea filed by the defendant. *Mullen vs. Maguire*, 436.
4. A *fi. fa.* and attachment execution may both issue and be pursued at the same time, and plaintiff will not be compelled to elect upon which he will proceed, unless property is seized under either sufficient to pay the judgment. *Shaw vs. Kenath*, 444.
5. Jurisdiction by attachment in execution must be exercised by aldermen and justices of the peace within the scope of the authority conferred upon them by statute; otherwise their proceedings are illegal and void. *Masters vs. Turner*, 483.
6. When judgment has been recovered against a defendant, and execution thereon returned, "no goods," debts due to him, deposits of money made by him, stocks, or other personal property, not exempt by law, belonging to him, may be attached, and the person in whose hands such property is, may be summoned as a garnishee; and after a service of interrogatories and a rule upon him to answer, as the law directs, if he be in default, or if it appear by his answers, or be shown by the proofs on hearing, that he owes the defendant a debt, or has property belonging to

ATTACHMENT EXECUTION—(Continued.)

him *equal to*, or *less* in amount or value than the plaintiff's judgment, then judgment should be specially entered that the plaintiff have execution of such amount or sum, naming it, thus in the hands of the garnishee; and that, if the garnishee refuse or neglect, on demand made by the constable, to pay the same, then it should be levied of the garnishee's goods and chattels, as in case of a judgment against him for his own proper debt; and further, that he be thereupon discharged as against the defendant of the sum so attached and levied. *Id.*

7. If, however, the debt thus due by the garnishee or the value of the property thus attached, be *greater* than the plaintiff's judgment, then the special judgment should be that the plaintiff have execution of so much thereof, naming the amount, as will satisfy his judgment against the defendant, *with interest and costs*; to be followed as in the former instance, by the additional entry relative to a refusal to pay, and also relative to a discharge on the part of the garnishee. *Id.*

8. Where the garnishee is in default, or contests his indebtedness to the defendant, or where there is a recovery against him for an amount greater than that admitted by his answers to be due to, or belonging to the defendant, the plaintiff is entitled to have execution against him for the costs of the attachment proceeding; but it is otherwise where he admits his indebtedness, or admits that he has property of the defendant, and surrenders it. *Id.*

9. The execution against the garnishee should recite the form of the judgment, and contain a command to the constable in substantial conformity with it. A further command should be inserted, that in the event of a levy and sale of the goods and chattels of the garnishee, if the proceeds exceed the amount for which the execution issued, the overplus, *less the costs of sale*, should be returned to the garnishee. *Id.*

10. A plaintiff has no right to receive from a constable anything more than the sum to be collected under the command of the writ, even though his judgment against the original defendant be greater than that against the garnishee. *Id.*

11. A judgment entered against a defendant and a garnishee jointly is without warrant in law; and though neither appeal nor *certiorari* be taken, and six years afterwards it be revived against the garnishee alone, neither appeal nor *certiorari* being then taken, and execution be issued on the latter judgment, commanding the constable to levy the same of the goods and chattels of the garnishee, *certiorari*, if taken in time, will avail to set aside the execution. Age, no matter how great, can never infuse vitality into a judgment entered by an alderman or justice of the peace, which lacks statutory authority originally. *Id.*

ATTORNEY.

1. An attorney cannot bind his client by an agreement for the sale of land. *Burkhardt vs. Schmidt*, 118.

2. A power of attorney to institute suit executed by the president of a bank without authority from the board of directors, is not sufficient. *Bank vs. Keim*, 311.

ATTORNEY-GENERAL. See PASSENGER RAILWAYS, 3.

BANKRUPTCY. See MORTGAGE, 3.

1. Proceedings in bankruptcy—Injunction issued restraining defendants from collecting any rents from real estate in which the bankrupts have any legal or equitable estate, and appointment of a receiver. *Keenan vs. Shannon*, 219.

2. Confession of judgment, and execution under it, where it must necessarily stop the debtor's business, is a void transfer and preference within the meaning of the bankrupt act, as of the date of the entry of judgment. *Zahn vs. Fry*, 243.

3. The court can decree a restoration to the assignee of the fund realized, although it may be in the custody of a State officer. *Id.*

4. Without actual fraud a creditor so preferred will be allowed, upon surrender, to participate in the bankrupt's assets. *Id.*

5. Judgment notes given *bona fide*, and for an amount actually received, will not be set aside merely because they were entered a month before a petition in bankruptcy was filed against the defendant. Some of the notes were dated three and four years before the petition was filed. *Piper vs. Baldy*, 247.

6. After a bankrupt's estate has been placed in the hands of a trustee under the direction of a committee of creditors, by virtue of the 43d section of the bankrupt act, the court cannot, in the absence of fraud, call a meeting of creditors to control the committee's action. *In re Jay Cooke et al.*, 262.

7. On the death of an involuntary bankrupt before a jury trial has been had to determine whether he has committed an act of bankruptcy, the proceedings must abate. *In re McDonald*, 373.

BANKRUPTCY—(Continued.)

8. In an application for the sale of real estate by a bankrupt's assignee, the proper inquiry for both the assignee and the court, is on what terms will it bring most for the creditors, subject to or discharged from, the incumbrances against it. *In re Iron Co.*, 274.

9. The right of an execution creditor or landlord upon a warrant issued before the commencement of the proceedings in bankruptcy, is paramount to the assignee in bankruptcy, and will control the fund as against the general creditors. *In re Weamer*, 275.

10. Where no question of disputable right exists, assignees in bankruptcy cannot obtain the instruction of the court, whether to do a proposed act, which, if proper on their part, would be within their own discretion and power on the administration of their trust. *In re Saving Fund*, 276.

11. Bankruptcy—Equity—Pleading—Amendment—Creditor's bill—Dower of bankrupt's wife. *Stotesbury et al. vs. Cadwallader et al.*, 281.

12. Under the amendment to the 39th section of the bankrupt law, the debtor will be required to file a list of his creditors, and the amount of their claims, where an involuntary petition was filed against him since December 1, 1873, to which he had made a denial and a demand for a jury trial, and had since filed a demurrer. *Bank vs. Palmer*, 286.

13. A manufacturer was adjudged a bankrupt, and the goods and chattels at the manufactory building were ordered by the court to be sold by the marshal, and the proceeds to be paid to the assignee that should be afterwards appointed. A sale was made and the marshal paid over to the assignee \$2,166.74. The 4th section of the State landlord and tenant act secures to the landlord a preference over other creditors for one year's rent, from the proceeds of the sale of personal property on the demised premises. A subsequent law extends the same privilege to operatives in manufactories for one month's wages. In this case there was due to the landlord for one year's rent \$2,700, and to the operatives about \$1,800. The landlord proved his debt, including the rent, without naming his lien or security, and took part in the election of an assignee, as an unsecured creditor, and afterwards, on ascertaining his privilege, asked leave to amend the proof by setting forth his security. The assignee claiming that he ought not to be allowed to amend; or, if allowed, that the operatives were entitled to be paid in full, one month's wages, in preference to the claim of the landlord. *It was held:*

That a creditor, having a lien, and proving his demand in ignorance of his privilege, without naming his security, should be allowed, in the absence of fraud, to amend his proof. *In re McConnell*, 287.

14. That it was not designed, by the 28th section of the bankrupt act, to give to the five classes of creditors there enumerated, any priority over secured creditors. *Id.*

15. That by the State laws, landlords and operatives, in cases of this sort, stand on the same footing, and being equally favored, are entitled to the payment of their preferred claims *pro rata*. *Id.*

16. An assignee in bankruptcy may appeal from an award of arbitrators under the compulsory arbitration law, without the payment of costs, the adverse party having taken out the rule of reference. *Morse vs. Gritmans*, 573.

BANK.

A power of attorney to institute suit, executed by the president of a bank without authority from the board of directors, is not sufficient. *Citizens' Bank vs. Keim*, 311.

BILL OF DISCOVERY. See EQUITY.

BILLS AND NOTES. See AFFIDAVIT OF DEFENCE, 1.

1. Notice of protest having been left with A on Sunday, being told what it was, and the following Monday being in time to serve said notice: *Held*, that that was sufficient. *Bank vs. Rheem*, 462.

2. A merchant agreed to accept bills drawn by his correspondent to the amount of two thirds of the value of an intended shipment. The vessel and cargo were lost, and the consignees were authorized by all parties in interest to settle with the insurance company for two-thirds of their claim. The consignors having drawn in excess of the amount agreed, and the insurance money being consequently insufficient to pay all the drafts, the court held that they ought to be paid in full in the order in which they were presented, until the fund was exhausted. *Cabada vs. De Jongh et al.*, 422.

BILLS AND NOTES—(Continued.)

3. Promise to pay debt of another—Indorser of note. *Wilson vs. Martin*, 470.
4. In a suit against three drawers of a joint promissory note, where there has been service of the writ upon two only, a copy of the note and a mere statement filed are sufficient to entitle the plaintiff to judgment against those served—under the 5th section of the act of March 21, 1806. *Donough vs. Boger et al.*, 616.
5. The notice required to be given by surety to a principal in order to discharge him from undoubted legal liability should be clear and explicit to proceed and collect the debt. *Id.*
6. The notice should be given after the maturity of the note, and reasonable time to proceed should be allowed, and the affidavit should state with certainty all the material facts required. *Id.*

BOARD OF SURVEYORS.

1. The authority given to the board of surveyors under the direction of the city councils, by the act of June 6, 1871, P. L. 1353, to confirm or reject plans or revisions of plans of surveys and regulations, invest them with power to alter or amend such plans in whole or in part, by blotting out or vacating one or more of the streets on such plans, and substituting others, or by adding new streets, and the action of the board upon any such plans unappealed from, is a finality. *In re Arch Street*, 117.
2. When a plan has been sent back, after a hearing, to the board of surveyors for reconsideration, and the board having reconsidered it, and by resolution confirmed it again, this is not a final judgment, but a person interested may take an appeal to the Quarter Sessions. *Duhring's Appeal*, 181.
3. The presumption is that the plan of the board is a proper one, and the court ought to be satisfied of clear mistake or abuse of power before they will reverse it. *Id.*

BOND.

- A treasurer's bond, given on his re-election in 1873 for the faithful accounting for funds coming into his hands for the term, will cover funds then remaining in his hands from prior terms. *De Hart vs. McGuire*, 359.

BOROUGH. See PENALTIES.

1. The officers of the borough of Ashland must be qualified electors of the borough, and if any officer during his term ceases to be an elector, as by removal from the borough, he also ceases to be one of its officers. *Comm. ex rel. vs. Lally*, 507.
2. The burgess of a borough incorporated under the general borough law of 1851, has no right to act as a member of the town council, and cannot refuse to sign ordinances regularly passed by the town council, on the ground that he was not present as a member when they were adopted. *Comm. ex rel. Shepp et al. vs. Kepner*, 510.
3. The chief burgess of a borough has the right to take proceedings in the nature of a *quo warranto* to oust a councilman under the act of 1860, for being interested in a contract for furnishing materials to said borough. He has a sufficient interest to make him a competent relator. *Comm. ex rel. Henry S. Kepner vs. Daniel Shepp*, 518.
4. A member of a town council, who is charged in a suggestion in the nature of a *quo warranto*, with having an interest in a contract for furnishing supplies to the borough of which he is an officer, must, in his plea, disclaim or justify. If the plea contain nothing of substance, if no material issue could be formed upon it, judgment will be given upon the record, as if the bad plea had no existence. *Id.*

BROKER. See LICENSE.

BUILDING INSPECTORS.

1. The word "rural" in the building inspection act of 1855 is not construed the same as in the tax act of 1854. *Hancock vs. Thayer*, 25.
2. Whenever the neighborhood is so compactly built up as to give it the character of the built-up portion of the city, the building inspection will apply and be enforced. *Id.*
3. The act of 1855 requires that all new buildings fronting on a court of less width than twenty feet shall recede so that the court shall be of that width; this act is constitutional and the owner is entitled to compensation. *In re Perry's Court*, 27.

BUILDING INSPECTORS—(Continued.)

4. A building erected upon a corner lot fronts upon both streets or alleys upon which it bounds, within the meaning of the act of April 21, 1855, and the streets or alleys must be twenty feet wide. *City vs. Michener*, 30.

CEMETERY.

1. A private claim to the right of interment in a cemetery lot will be enforced by mandamus. *Comm. ex rel. vs. Cemetery Association*, 385.

2. A provision of the charter of a cemetery company which prohibits the transfer of lots without consent of the managers, is binding upon grantees, and a transfer without such approval passes no title. *Id.*

3. A lot-holder who has executed and delivered a deed of transfer of his lot, unapproved as aforesaid, still has the right to order and compel an interment in said lot. *Id.*

CITY OF PHILADELPHIA.

See **BUILDING INSPECTORS**, 1, 2. **COLLECTOR OF DELINQUENT TAXES**, 1. **BOARD OF SURVEYS**, 1, 2, 3. **PUBLIC BUILDING COMMISSION. COUNCILS. EVIDENCE**, 14. **PASSENGER RAILWAYS**, 2. **ROADS AND STREETS**.

1. A passenger railway company having laid their road in the streets of the city of Philadelphia, under authority of a charter from the State, are liable to the regulations adopted by councils for the preservation of the public rights in the highway. *Railway Company vs. The City et al.*, 72.

2. But where an obstruction arises by the laying of another railway track on the same street, under a subsequent charter, it is not reasonable ground to authorize a city ordinance to require the removal of the first track, and such removal by the city authorities is illegal, and will be restrained by injunction. Such removal is not a public work under the act of April 8, 1846. *Id.*

3. A passenger railway company having accepted their charter with the knowledge that the city possessed the most ample power to legislate by ordinance as to her streets and highways, to make all needed regulations for the most convenient enjoyment of the same, by the citizens of the Commonwealth, they are bound by an implied agreement to hold their special privileges subject to a proper exercise of this power by the councils of the city. *Id.*

4. The vital question in every such case is, is the regulation or order of the municipal authority reasonable and necessary? If it is, it will be maintained; if it is not, it will be set aside. *Id.*

5. The park commission has power to use the name of the city of Philadelphia in any proceeding at law or in equity that may be necessary to carry into effect the objects referred to in the act creating the commission. *The City vs. Railway Company*, 165.

6. Under the acts of Assembly relating to Fairmount Park, the city councils alone are authorized to determine when city loans shall be issued for the permanent improvement of the park. *Comm. ex rel. vs. Park et al.*, 445.

7. The power of the Legislature of the State over the streets of the city are so ample, that no matter what hardship may be imposed upon citizens owning or occupying property thereon, equity can give no relief. *Maria et al. vs. Railway Company et al.*, 41.

8. The State having granted a right to lay rails on a street, to one corporation, cannot grant any right to another, which will interfere with that right first granted. *Id.*

9. A grant of right to cross any "railways and railroads now or hereafter to be laid on Market street," does not give a right to cross a railroad now constructed. *Id.*

10. By the act of April 21, 1858, it is provided that no contract shall be binding upon the city of Philadelphia unless an appropriation sufficient to pay the same be previously made by councils. *Held*, that where an appropriation was made sufficient at the time to pay the contract in full, a subsequent diversion of the same to other objects by the city left the city liable as though such diversion had not been made. *McGlue vs. City*, 348.

11. Where the city has directed that a stream partly natural and partly artificial should be culverted, defendant, who was the contractor to fill up and grade a street, will be restrained from filling up the stream before the culvert has been erected. *Sanger et al. vs. City et al.*, 338.

12. If property-holders nominate A to the commissioners to do the paving, the fact that they nominate another person afterwards, does not revoke their nomination of A. *Long et al. vs. O'Rourke et al.*, 129.

13. ALLISON, P. J., dissents. *Id.*

14. The duties of a county treasurer, by the consolidation act of 1854, devolve upon the city treasurer. *Comm. vs. Fox*, 204.

CHARTER. See **CORPORATION.**

COLLECTION AGENT.

Where defendants undertake merely to forward a claim for collection they can only be held liable for fraud or concealment, and the statute of limitations will be a bar to an action against them. *Morgan et al. vs. Tener et al.*, 412.

COLLECTOR OF DELINQUENT TAXES.

The act of March 24, 1870, creating the office of collector of delinquent taxes, does not authorize the collector to sell the goods of a tenant for taxes due by the owner. The collector has only the power given him in this act. *McAfee vs. Bunm*, 157.

CONSTITUTIONAL LAW. CORPORATION, 15. SALARIES.

1. The 27th section of Article III. of the new Constitution is obscurely worded, but its manifest purpose was to get rid of the State officers of inspection. *Elton vs. Geisert et al.*, 330.

2. When the Constitution says, no office for inspection or measuring shall be continued, and an intent to the contrary does not appear, we are to suppose the convention intended to mean that they should not be continued after the adoption of the Constitution. *Id.*

3. What is said upon the floor of the convention is a proper aid in an investigation of this character. *Id.*

4. The general sections 28 and 29 of the schedule do not control or modify the 27th section of Article III., as it is "otherwise provided in the Constitution." *Id.*

5. The schedule was added to prevent inconveniences from changes in the Constitution; this, in its effect on persons in office, was intended to prevent inconvenience to those who filled offices, in harmony with the instrument, not to those who were to be deprived of office by its adoption. A general provision in statutes does not overrule a special provision, when both can be so construed as to stand. *Id.*

6. Penalties collected by magistrates under act March 29, 1869, are payable into the county treasury, under the 13th section of Article V. Constitution of 1873. *Comm. ex rel. vs. Randall*, 451.

7. The act of April 14, 1851, authorizing judgments to be taken in certain cases where no affidavit of defence is filed, in Schuylkill county, is not annulled or repealed by section 26 of Article V. of the new constitution. *Bright vs. Coal Co.*, 609.

8. Where it was intended by the constitution to annul or abrogate any existing law, the intention is expressed in unambiguous language. *Id.*

9. The right of eminent domain in the State cannot be restricted except as provided by the constitution, delegated by the inherent power of the people. It is an infringement of that instrument to allow private property to be taken for private use. This can only be done for public purposes, and by paying or securing the payment thereof. The 10th section of Article IX. is a disabling, not an enabling, clause. *Railroad vs. Lawrence et al.*, 604.

CONTRACT. See **EQUITY, 15. EVIDENCE, 3.**

The provision of a railroad contract that the decision of the engineer shall be final and conclusive in any dispute which may arise between the parties relative to or touching the same, does not include within its terms of submission damages happening to the plaintiff from a rescission of the contract. *McGovern vs. Bockius*, 438.

COPYRIGHT.

A defendant will be restrained by injunction from using the title of a dramatic composition which has been copyrighted, even though the body of the play intended to be presented under that title may be different from the copyrighted play. *Shook vs. Wood*, 373.

CORPORATION. See **EQUITY, 22, 35, 36, 37, 38, 39. INSURANCE. FIRE CO.**

1. The act of 1856, in relation to dissolving corporations, applies to such as are directly incorporated by the Legislature. *In re Credit Mobilier*, 2.

2. This court will not make an order for the dissolution of a corporation, if it would prejudice the public welfare or the interest of the corporators. *Id.*

CORPORATION—(Continued.)

3. A charter will not be approved where membership is not restricted to citizens of this commonwealth, or where there is a provision that membership is to be forfeited upon enlistment in the army or navy. *In re Benevolent Society*, 19.
4. Substantive alterations of a charter should be assented to by the body who compose the corporation, and where that body is the stockholders, the directors or trustees have no power to accept or reject such alterations. *Brown vs. Mining Co.*, 32.
5. There must be a regular acceptance of the alterations of a charter before they can bind the members. *Id.*
6. The Legislature cannot alter a charter so as to impair the terms of the contract between the members and the corporation. *Id.*
7. The Court of Common Pleas has no authority to incorporate a club with the provision that each share shall be entitled to one vote. *Comm. ex rel. vs. Conover*, 55.
8. The acts only authorize the court to confer such immunities as by the common law were necessary to constitute a corporation. *Id.*
9. Membership of a corporation—Right to vote. *Comm. vs. Burial Society*, 68.
10. Under the act of February 18, 1869, the courts will not approve an act of incorporation of a company to trade in real estate for the benefit of the stockholders alone. *In re Building Co.*, 106.
11. Service on a director of a corporation under the act of March 17, 1856, is good, where none of its officers reside in the county, and part of the property of the corporation is in the county, and the articles of association designate the county as the place of its principal office. *Grubb vs. Manufacturing Co.*, 316.
12. A mortgage given by a corporation on its leasehold interest, machinery and fixtures and no objections made against its validity by the company, cannot be defeated by an assignee in bankruptcy of the company on his affidavit that it was given without due authority. *Lewis vs. Axle Works*, 334.
13. Corporate franchises cannot be declared forfeited, or lapsed to the Commonwealth, by bill in equity. *Lejee vs. Railway*, 362.
14. Under the act of June 19, 1871, Purd. 288, courts may give relief by injunction at the suit of private parties, or of corporations, when it is alleged that private or individual rights are injured or invaded, by any corporation claiming to have a franchise, to do the act from which the injury results. *Id.*
15. Questioned—Whether corporate franchises which have become vested by acceptance or otherwise, can be taken away or declared forfeited to the Commonwealth, by an alteration or amendment of the Constitution of the State. And whether such grant is not protected by Article 1, section 10, of the Constitution of the United States. *Id.*
16. It must appear by petition or affidavit that at least three signers of articles of incorporation are citizens of Pennsylvania. *In re Beneficial Society*, 380.
17. The articles must show the place where the business is to be transacted; the location of its office is not sufficient. *Id.*
18. Notices of application for charter must be published in the *Legal Intelligencer* and two general newspapers. *Id.*
19. Such notice should specify particularly the time and place of such intended application. *Id.*
20. Requisites of application for charter, examined and discussed. *In re Relief Association*, 546.

CONVERSION.

Testator devised to his wife in trust for herself and children, and, after a certain time, "if the executor thinks it will be more productive," the property to be sold, and the money divided. The parties in interest, having elected by deed to take the land in lieu of the proceeds of the sale thereof—*Held*: That a deed from them, without joining the executor, passed a good title to defendant. *Twaddell vs. Land Co.*, 63.

COUNCILS. See FAIRMOUNT PARK, 1. PASSENGER RAILWAYS, 2. ROADS AND STREETS, 8. BOROUGHES, 3, 4.

1. Private citizens, having no particular or special interest to be affected, have not the right to ask for a *quo warranto* to oust a member of councils. *Comm. ex rel. vs. Horne*, 164.
2. The office of councilman is a town office. *Comm. ex rel. vs. Bumm*, 162.
3. A citizen who claims a seat in councils in place of one who has removed from the ward, has sufficient interest to entitle him to a writ of *quo warranto* to determine the question of forfeiture. *Id.*

COVENANT. See **EQUITY**, 12.

1. Equity will restrain a defendant from carrying on the business of horse-shoeing "in Germantown or its vicinity" when the defendant has entered into an agreement with plaintiff to that effect. *Carroll vs. Hickey*, 308.

2. Before a covenant not to practise medicine "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff. *McNutt vs. McEwen*, 112.

3. Covenant based on a deed of conveyance of land, containing a general warranty. *Hauck vs. Single*, 551.

CRIMINAL LAW. See **EVIDENCE**, 12. **ALDERMEN AND JUSTICES.**

1. The statute of limitations is a bar to an indictment for bigamy. It begins to run from the date of the second marriage. *Comm. vs. McNerny*, 206.

2. One who pursues and arrests a thief who has stolen a mule, is not thereby entitled to the reward allowed by the act of 1821 for the pursuit and arrest of a horse thief. *Comm. vs. Edwards*, 215.

3. A partner cannot be indicted for forgery of an instrument of writing with intent to defraud the copartnership. *Comm. vs. Brown*, 184.

4. An attempt to illegally vote is an indictable offence. *Comm. vs. Jones*, 211.

5. The distribution of prizes by chance amounts to a lottery. *Comm. ex rel. vs. Sheriff*, 203.

6. The Commonwealth is allowed to stand aside jurors without assigning cause of challenge. *Comm. vs. Keenan*, 194.

7. An indictment under the act of May 3, 1871, should charge that the offence was committed in the Twenty-second ward. An indictment general in its terms is not sufficient under this act. *Id.*

8. As there are two acts of assembly requiring licenses to theatres, an indictment against the proprietor of a theatre should allege under which act the charge is made. *Comm. vs. Fox*, 204.

9. Where a statute creates an offence, and, on conviction, imposes a penalty, without prescribing a method of prosecution, the proceeding may be instituted either by summons in debt, in the name of the Commonwealth, for the uses directed in the statute, or by warrant of arrest, at the discretion of the justice. And in such a case there is no appeal. The Legislature may declare a new offence, and provide a mode of ascertaining the guilt of one charged with it, as well as the measure of punishment. *Comm. vs. Davenport*, 478.

10. A summary proceeding must be predicated on an information containing the day and the place of the taking of it, the name of the informer, the name and official designation of the magistrate taking it, the name of the offender, together with an exact description of the offence, and the time also of its alleged commission—not the precise day, perhaps, but one within the limitation fixed in the particular statute for prosecution. *Id.*

11. The record of a conviction or judgment must show that a strict observance of these preliminaries has been had; further, that the defendant was summoned, or had notice of the charge, and an opportunity to make his defence; that he was convicted on confession, or that evidence, such as is within the approval of the common law, was adduced in support of the charge, giving the evidence or the exact substance of it, not its effect or result, and that the witnesses were sworn or affirmed. The particular circumstances should also be set out, showing jurisdiction and a conformity with the law on the part of the justice. Conviction, judgment, and execution according to the common law, or as varied by the statute, should follow; though, unless specially so provided, the alternative duration of imprisonment on failure to pay or to furnish a sufficient distress, need not appear in the conviction. Imprisonment is a part of the warrant of execution, and must be set out therein. *Id.*

CUSTOM.

1. While no statute or principle of public policy intervenes, but a rule of law is a mere privilege which may be waived, such waiver may be as well by a custom known to and acquiesced in by the parties, as by an express contract. *Colket et al. vs. Ellis et al.*, 375.

2. A custom among brokers to sell stocks deposited as collateral security for a call loan, at the board, on failure of the borrower to pay on the day on which demand is made, is not illegal as to parties familiar with and dealing on the basis of such custom. *Id.*

DAMAGES. See **LANDLORD AND TENANT.**

DEMURRAGE.

1. The charter party stipulated that the ship should "be discharged as fast as the custom of the port will admit," and demurrage to be charged after the expiration of ten days. *Held*, that after that time she was entitled to demurrage, although it was occasioned by the pre-occupancy of the wharf by other vessels. *Futterer vs. Abenheim*, 225.
2. Where a vessel is required to load or discharge her cargo at a particular dock, and she is there detained by reason of its crowded condition, the delay must be compensated by the charterer. *Id.*

DEVISE.

1. A lapsed legacy or devise usually falls into the residue and goes to the residuary legatee or devisee. If there be no residuary legatee or devisee, or if the lapse be of a part of the residue itself, then it passes as intestate property to the next of kin or heirs of the testator. *Lovett vs. Lovett*, 537.
2. An executory devise may be limited to take effect after several intervening estates, either vested or contingent, if the final contingency upon which it is to vest be not too remote; that is, it must happen, if at all, within a life or lives in being and a competent time afterwards. *Id.*

DIVORCE.

1. A libel in divorce should state that there was an actual marriage, not a mere agreement to marry. *Brinckle vs. Brinckle*, 1.
2. The libel in divorce must allege "cruel and barbarous treatment." It is not sufficient merely to prove it by depositions. *Schlichter vs. Schlichter*, 11.
3. In a libel for divorce by a husband against a wife, he must allege that the respondent by her "cruel and barbarous treatment," rendered his condition intolerable or life burdensome. *Pennington vs. Pennington*, 22.
4. The act of March 9, 1855, does not alter this rule. *Id.*
5. It seems that a marriage under the duress of an arrest and threat of imprisonment on a false charge is ground for divorce. *Pyle vs. Pyle*, 58.
6. In this case the court refused to find such duress upon the unsupported testimony of the libellant. *Id.*
7. It is only after a sentence nullifying or dissolving a marriage, or a conviction of bigamy, that the parties are at liberty to marry again as if they had never been married: *Harrison vs. Harrison*, 1 Phila. 389, and *Howard vs. Lewis*, 6 Id. 55, cited and followed. *Thompson vs. Thompson*, 131.
8. A libel may state that the marriage was contracted in the month of January, but the respondent has the right to call for a particular statement of the exact time, manner, etc. *Brinckle vs. Brinckle*, 144.
9. An amendment to a libel in divorce will be allowed even after it has been referred to an examiner, if he has not entered upon the performance of his duties, and no hardship would be imposed upon the respondent by the amendment. *Toone vs. Toone*, 174.
10. The court in a proceeding for divorce may direct that the person, to whose custody the child is given, shall give bond to produce it in court whenever a judge may direct. *Deringer vs. Deringer*, 190.
11. A had been ordered by the court to pay \$5 per week for the support of his wife, and afterwards was divorced from his wife by an act of assembly:—*Held*, that he could not be obliged to pay anything further after the passage of the act, but the court declined to vacate the original order. *City vs. Theile*, 205.
12. In proceedings in divorce, if a subpoena is served on a person residing in Massachusetts, it is as good a service as publication of notice by advertisement. *Snyder vs. Snyder*, 306.
13. An answer or a plea should have the same caption or superscription as the suit. An admission of the allegations in a declaration is not presumed because the plea has the same caption as the declaration. *Brinckle vs. Brinckle*, 339.
14. No decree of divorce can be pronounced by the courts of Pennsylvania which can affect the rights of the respondent, being a non-resident, and having no notice, and a decree under these circumstances, the notice merely being statutory, can have no extra-territorial effect, and is not conclusive upon the respondent. *Love vs. Love*, 453.
15. The respondent in proceedings for divorce lived in this county. Her residence was known to her husband, and his relatives, and probably to his counsel. The libel was not signed with the libellant's name. The subpoena and alias subpoena were returned nihil.

DIVORCE—(Continued.)

The proclamation was inserted by the direction of counsel for libellant in an out of the way place in a weekly paper, that it might not be seen.

The notice of the time and place of taking testimony before the commissioner was not served personally on the respondent as directed by the court.

Held, That the court had power to reverse a decree of divorce thus obtained from it. *Wanumaker vs. Wanumaker*, 466.

DOWER.

The widow of a tenant in fee which fee is determined by the death of the tenant without issue, is entitled to dower in the estate thus determined. *Lovett vs. Lovett*, 537.

DRUGGIST.

Druggists and apothecaries having the right to retail liquors for the purpose mentioned in the statutes are retailers *sub modo*. *Comm. vs. Porter et al.*, 217.

The word retailer cannot be construed with reference to them and their business as druggists. *Id.*

It is not to be inferred because the constable in his return calls them "retailers of liquors," that they sold and delivered liquors to be used as a beverage. *Id.*

DURESS. See **DIVORCE**, 5, 6.**EASEMENT.** See **PARTY WALL**, 2.

The legal remedy for disturbance of a right of way is an action of trespass on the case. *Jones vs. Park*, 165.

ELECTIONS. See **CRIMINAL LAW**, 4.

1. The numbering of the ballots required by the new constitution is a wise provision, intended as an additional safeguard against fraud, and whenever votes have been received and counted which are shown to have been illegal, and which, if thrown out, would alter the result of the election, the court will order the ballot-boxes to be opened, in order to ascertain for whom the illegal votes were cast. But the court will not order this to be done unless the illegal votes proved are sufficient in number to alter the result of the election. *Daly vs. Petroff*, 369.

2. An election may be characterized by such an amount of fraud, and be attended by circumstances evincing such a total disregard of the election laws, and of the rights of the honest electors, as to require the court to throw out the entire return from the division in which these wrongs have been perpetrated. But the power to throw out an entire division is one which ought to be exercised with the greatest care, and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes were lawful and what were unlawful, or to arrive at any certain result whatever; or where the great body of the voters has been prevented by violence, intimidation and threats from exercising their franchise. *Id.*

3. Former paupers in the almshouse, who have been discharged as such, but who remain in that institution under contract of service for hire, are entitled to vote as residents of the precinct. *In re Registry Lists*, 213.

4. The act of April 4, 1872, changing the time of holding the municipal elections in the city of Scranton, from the first Tuesday in June of each year, to the first Friday in May, and repealing "all acts and parts of acts inconsistent" therewith, was not designed to blot out all laws for the holding of municipal elections in that city after the year 1872. Though inartistic and vague in its terms, still there is enough about it to indicate the legislative intent, which was to change the time of holding the municipal elections, not for the year 1872 alone, but permanently thereafter. *Bouton vs. Royce*, 559.

5. When a complaint in a contested election proceeding is in due form upon its face, it is the duty of the court to take jurisdiction, and to make such orders and decrees as will speed the investigation. When, however, the prerequisites necessary to confer jurisdiction have not been complied with, as shown by the face of the complainant itself, the proceeding will not be entertained, but, on the contrary, it will be dismissed at once. *In re Barber*, 579.

6. A proceeding to contest an election, is in the nature of an appeal by the people to the court from an undue election or false return. The act of assembly authorizing it, is remedial in its character, and should be construed liberally, and for the advancement of the remedy. *Id.*

ELECTIONS—(Continued.)

7. Where a complaint contesting an election to the office of prothonotary, purporting on its face to be signed by thirty qualified electors, two of whom have vouched its correctness under oath, has been filed in the proper office; and subsequently it is found that one of the thirty complainants, though a well-known citizen, did not at the time he attached his signature, possess all the qualifications of an elector, the court will not, for this reason alone, dismiss the complaint; but, if the case be a proper one, will, in the exercise of a sound discretion, permit it to be amended by allowing the name of another person possessing all the qualifications of an elector, to be attached thereto, accompanied by appropriate vouching; and, thus, bring the proceeding not only within the letter, but within the spirit and purpose of the law. *Id.*

8. The election laws were enacted to be observed, not to be set at naught. They are mandatory, not directory. When the terms of a statute are absolute, explicit and peremptory, no discretion is given, and when penalties, sharp and severe, are imposed against the violation of its respective terms, they have the effect of negative words, and render its observance imperative. *Id.*

9. The act of July 2, 1839, and the act of April 17, 1869, contemplate that nothing less than a record shall be kept of the manner in which the right of the elective franchise has been exercised. The former requires that it shall consist of a list of voters, tally-papers, certificates of the oaths taken and subscribed by the inspectors, judges and clerks; and, in addition to these, the latter requires that it shall consist of the affidavit of a witness together with the affidavit of every person voting, whose name appears on the list of voters, but not on the registry list. This record is to be filed in the proper office, and "be subject to examination." *Id.*

10. Whenever, therefore, a record thus made up and filed, exhibits on its face that the officers conducting the election have negligently, recklessly, and in violation of their sworn obligations, disregarded the plain mandates of the law, no favorable presumption whatever attaches to their return. On the contrary, being thus *false upon its face*, there can exist in connection with it no peculiar or indescribable sanctity which will exempt it from the same untoward presumption attaching always to every record of official misdoing. *Id.*

11. In adjudicating, however, upon a contested election, it is the duty of a court, whenever the possibility to do so exists, to see that every legal vote cast be counted, not thrown away. And it is only when the whole proceedings connected with the election at any poll, whether shown by the face of the papers, or, *aliunde*, are so tarnished by the fraudulent, or criminally negligent conduct of the officers, as to be altogether unreliable, that a court will be warranted in casting out wholly the return of such poll from the general count. *Id.*

12. But human laws can never be so constructed that courts can render perfect justice under all circumstances. Occasions will arise when approximate justice is all that can be administered. When, therefore, legal and illegal votes have been counted indiscriminately, and a majority has resulted in various districts embraced in the general return, whether for one candidate or the other, the only means whereby even approximate justice can be reached, is to require him for whose advantage such majority districts enure, to lift the curse which the law has imposed upon the illegal ballots, otherwise they will be deducted from his count. *Id.*

13. The doctrine in *Duffy's Case*, 4 Brew. 531, 2 Luz. Leg. Reg. 49, reasserted. *Id.*

EQUITY. See LANDLORD AND TENANT, 6. CORPORATION, 13, 14. ROADS AND STREETS, 3. NUISANCE.

1. Preliminary injunction will not be continued where plaintiff has slept upon her rights for years. *Parker vs. Spillin*, 8.

2. An injunction will be granted to restrain the sale of a wife's property for the debt of her husband, where her title is clear and undoubted. *Allen vs. Benners et al.*, 10.

3. Unless plaintiff can show that he was actually a partner, an injunction will not be granted nor a receiver appointed. *Simms vs. Brouse*, 13.

4. A person who holds the legal title to church property and claiming that the church is indebted to him, but his claim not being substantiated, will be compelled to convey the property to the equitable owner and pay the costs of the proceedings. *Beatty et al. vs. Henry et al.*, 35.

5. If the answer of defendant cannot by act of assembly be admissible in evidence against him if he were charged with a misdemeanor, he will be compelled to answer complainant's bill. *City vs. Keyser*, 50.

6. The fact that defendant has given plaintiff a bond for the performance of his duty does not prevent plaintiff proceeding in equity against him. *Id.*

EQUITY—(Continued.)

7. The jurisdiction in equity having once rightfully attached, it can be made effectual for complete relief. *Id.*

8. In equity, all parties to be affected by the decree must be joined. *Pettit vs. Baird*, 57.

9. A court of equity will not restrain a creditor from levying upon the property of his debtor's wife, when by fraud and collusion she has been active in defeating her husband's creditors, or when her title to the property is disputed. The creditor has a right to test ownership, and she will be left to her remedy at law. *Simson vs. Bates*, 66.

10. The court declines to make a decree upon a judgment *pro confesso* which appears to have been taken collusively. *Ash vs. Bowen*, 68.

11. Equity will not restrain the payment of purchase-money to defendant, when no interest of plaintiff will be jeopardized by such payment. *Thomas vs. Abbott*, 78.

12. A grantee who takes a conveyance with full knowledge of a covenant in relation to the land made by the grantor, but not contained in the deed from the grantor to the complainant, will be restrained by injunction from a violation of the covenant. *Bricker vs. Grover*, 91.

13. A return of *nulla bona* is not sufficient to found a bill under the act of 1863, making the officers of certain corporations liable in equity for their debts.—The return must set out that no real or personal property of the corporation was exhibited to the officer, sufficient to satisfy the debt, as required by the act. *Bacon vs. Morris*, 93.

14. Plaintiff should allege in his bill his right to a drain which he alleges defendant is about to obstruct. *Barry vs. McAvoy*, 99.

15. A residuary devisee of real estate cannot sustain a bill to compel the execution of a contract of decedent against his executors and the vendor. The estate must be settled in the Orphans' Court. *Louvy vs. Louvy*, 105.

16. The prayer of a bill for an injunction, against parties not named in the bill, and not in court, cannot be granted. The decree must be against the parties named in the bill. *Long vs. Dickinson et al.*, 108.

17. Before a covenant not to practise medicine "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff. *McNutt vs. McEwen*, 112.

18. A motion to dissolve an injunction can only be made after answer filed. This does not apply to *ex parte* injunctions. *Heyl vs. City*, 112.

19. A license to take away soil, sand, etc., where the grantee has expended money on the faith of it, cannot be revoked. *Davis vs. Souder*, 113.

20. A bill for discovery in aid of execution is a proceeding in equity, and should be printed, as required by the equity rules. *Eting et al. vs. Levy et al.*, 139.

21. Equity will not restrain a proceeding by landlord against tenant for possession upon grounds, such as change of title, which may be asserted by the tenant in the proceeding itself. *Vanarsdalen vs. Whitaker*, 153.

22. If plaintiff's firm-name falsely imply that they are a corporation, a court of equity will not assist them. *McNair vs. Cleave*, 155.

23. A Chinese laundry in a basement so conducted as to injure the trade of a tradesman in the next story, may be such a nuisance that equity will interfere to prevent damage from it. *Warwick vs. Wah Lee et al.*, 160.

24. An injunction will be refused because no bill in equity has been filed. *Wilson vs. Childs*, 275.

25. Equity will restrain a defendant from carrying on the business of horse-shoeing "in Germantown or its vicinity," when the defendant has entered into an agreement with plaintiff to that effect. *Carroll vs. Hickey*, 308.

26. A special injunction to restrain the erection of a proposed abattoir and slaughtering-house will not be granted where the affidavits do not establish the fact that they will be a nuisance. *Sellers et al. vs. Railroad*, 319.

27. Where A and B occupied separate floors of the same building, and A had allowed B to believe before he took the lease that he would not object to a sign on the balcony of the second floor—*Held*, that A could not restrain B from putting up a sign there. *Garrett vs. Mulligan*, 339.

28. The unauthorized occupation of a street by railway tracts is a nuisance *per se* which equity will restrain, upon information of the attorney-general, without a preliminary trial at law. *Attorney-General vs. Railway*, 352.

29. In equity pleading the averments of the original bill and of the answer to a cross-bill are to be taken together in determining the sufficiency of the answer to the cross-bill. *McIlwain vs. Market Co.*, 371.

30. The bill and cross-bill and their respective answers are to be treated as part of one case. *Id.*

EQUITY—(Continued.)

31. A decree for an account cannot be had where defendants show a personal liability for what is asked. *Potter et al. vs. Hoppin et al.*, 396.

32. To enable a private person to maintain a bill in equity for the prevention or remedy of a public nuisance, he must show that he will sustain a private injury, separable from and in addition to the public inconvenience. *Blanchard vs. Reyburn*, 427.

33. Equity will not enjoin against merely fanciful inconveniences, but only against such injuries or inconveniences as naturally interfere with the ordinary comfort, physically, of human existence. *Id.*

34. An injunction will not lie to restrain the exercise of a public office. *Quo warranto* is the remedy. *Campbell vs. Tuggart et al.*, 443.

35. It is too late to amend a bill in equity, after bill, answer, replication, reference to master, and examination of witnesses. *Dougherty vs. Murphy*, 509.

36. In a bill in equity, filed under the act of assembly of 18th July, 1863 (relating to mining companies), to recover from the officers and directors of the company, the debts due by the latter, neither the company nor the secretary should be joined as a defendant. *Young vs. Oil Company*, 525.

37. A bill brought under said act will not be dismissed for multifariousness because it embraces, as grounds for its support, two separate debts due to two separate plaintiffs. *Id.*

38. The bill must state that the sheriff made demand on the executions issued against the company, and when he made it. *Id.*

39. If two judgment creditors join as plaintiffs in the bill, it is not sufficient to charge that the corporation did not exhibit sufficient estate to satisfy both writs of execution against it. If there was enough property to satisfy one writ, the officer should have sold it. *Id.*

Query? Whether a bill should be dismissed because it does not aver that no portion of the judgment against the company (the foundation of the bill) has been paid. *Id.*

ESTOPPEL. See GROUND RENT.

EVIDENCE. See EQUITY, 5.

1. Evidence that defendant was enjoined from using demised premises by an *ex parte* injunction issued at the instance of plaintiff, is admissible under plea of "eviction" in an action for rent. *Pfund vs. Herlinger*, 13.

2. It is no objection to the admission of plaintiff's book of original entries, because the charges contained therein had been posted in the ledger, which was not produced. Defendant could have compelled production of the ledger by notice. *Stokes vs. Fenner*, 14.

3. Evidence of the usage of the trade may be admitted to explain an ambiguous contract, not to contradict it. *Id.*

4. An interested witness and party cannot prove a writing which was made prior to the death of the other party. *Truitt's Estate*, 16.

5. The inventory is *prima facie* evidence of the amount of the assignee's liability. *Id.*

6. Wife of defendant in an attachment against stock standing in her husband's name cannot be allowed to testify that the stock belongs to her. *Boyle vs. Haughey*, 98.

7. The general rule is, that in order to establish the validity of a will the subscribing witnesses must be called, if living and within the jurisdiction of the court, but if, after strict, diligent and honest inquiry, satisfactory to the court under the circumstances of the case, the subscribing witnesses cannot be found, other evidence will be admitted to prove the signature of the testatrix. *Givin vs. Green*, 99.

8. A father claiming under the act of April 15, 1851, as amended by act of April 26, 1845, for damages for the death of his son, claims in privity with the son. *Stein vs. Railway*, 440.

9. The admissions of one person are evidence against another in privity with him. *Id.*

10. Verbal declarations are properly admissible as part of the *res gestæ* when they accompany some act, the nature, object, or motive of which is the subject of inquiry. *Id.*

11. In an action by a father against a railway company for damages for the death of his son, the declaration of the son immediately after the happening of the accident, that he had jumped from the car, was admissible: 1st. As an admission against interest. 2d. As a part of the *res gestæ*. *Id.*

EVIDENCE—(Continued.)

12. The defendant's admission as to a former marriage may be given in evidence against him to prove such fact. *Comm. vs. Henning*, 209.

13. Under the act of 11th of March, 1848, material averments contained in the municipal claim filed are *prima facie* evidence of the things averred. *City vs. Reilly*, 10 S. 467, distinguished from this case. *City vs. Esau*, 425.

14. In actions for penalties for violating ordinances, the essential parts of the evidence should be set forth. *City vs. Harbison. Same vs. Boist*, 306.

15. The general rule in Pennsylvania is, that all papers given in evidence in the trial of the cause, except *depositions*, are to be sent out with the jury. *Shomo vs. Zeigler*, 611.

16. A certified record of bankruptcy offered in evidence during the trial, through which the plaintiff claims the land, may be sent out with the jury, even though there are depositions attached to the proceedings relative to the bankruptcy, but immaterial to the controversy. Such depositions stand on a different footing from ordinary depositions, for the record cannot be cut up and mutilated. *Id.*

17. It is the duty of counsel to object to papers before they are admitted to the jury-room. *Id.*

EXAMINER. See **DIVORCE**, 9.

EXECUTION. See **EQUITY. PRACTICE.**

EXECUTORS AND ADMINISTRATORS. See **EQUITY**, 15. **AFFIDAVIT OF DEFENCE**, 2. **WILL**, 7. **CONVERSION.**

1. An administratrix who assumes the charge of real estate will be liable to account for the highest rent that can be obtained, but she may show that she has used all possible diligence, and then she will not be charged for rent not received. *Burns et al. vs. Cox*, 8.

2. Proceeds of realty—sold under a power—and found within this jurisdiction, will be ordered into the hands of the administrator *d. b. n. c. t. a.* of him whose realty was sold, rather than to the administrator *c. t. a.* of his widow, who had hitherto held as executrix, and enjoyed as life-tenant such proceeds, even though she was a creditor of her said husband's estate by an amount nearly equalling the fund in controversy: *Provided*, those in remainder desire distribution through such first administration. *Tucker vs. Horner et al.*, 122.

3. One of several executors has the right to sell stock of his testator, and if he does actually agree to sell, and the price is paid, title passes—but one who deals with another holding a certificate with a power to sell and transfer, signed by the executor, does not obtain a valid security for a loan by the delivery of such certificate and power, unless as matter of fact, there had been a sale and payment of the price, so as to divest the title of the decedent. *Wood et al. vs. Mailland et al.*, 84.

4. Where the defendant dealt directly with the executor, the ruling of the Supreme Court in *Mailland's and Hand's Appeal* does not apply. *Wood et al. vs. Ellis*, 138.

EXEMPTION LAW.

A defendant is entitled to the benefit of the exemption law in a proceeding commenced under the act of March 17, 1869, if the original demand be founded on contract. *Washburn vs. Baldwin*, 472.

FAIRMOUNT PARK.

1. Under the acts of assembly relating to Fairmount park, the city councils alone are authorized to determine when city loans shall be issued for the permanent improvement of the park. *Comm. vs. Park et al.*, 445.

2. The park commission has power to use the name of the city of Philadelphia in any proceedings at law or in equity which may be necessary to carry into effect the objects referred to in the act creating the commission. *City vs. Railway*, 165.

FENCES.

1. At common law the owner of cattle was liable for injury done by them, as in the eye of the law every man's land was set apart by enclosures from that of his neighbors. *Race vs. Snyder*, 533.

FENCES—(Continued.)

2. This was universally held to be the law in the northern counties until the case of *Gregg vs. Gregg*, 5 P. F. Smith, 227. That case construed the acts of assembly to change the common law. *Id.*

3. If the owner of improved land has no fence enclosing his crops, he cannot recover for injury done to them by roving cattle. *Id.*

4. The construction given to the statutes relating to fences. (Opinion of Judge Addison approved and in part adopted.) *Id.*

5. A fence should be such as farmers of practical knowledge and experience would consider as sufficient to protect crops from injury by orderly cattle. With such sufficient fence an action may be sustained, although not made of logs, or rails, or posts and boards, and not "four and one-half feet high and well-staked and ridged." *Id.*

FIRE COMPANY.

The provision contained in the 3d section of the act of 28th May, 1872, relating to the dissolution and surrender of charters of fire companies in the city of Philadelphia, which confines the distribution of the effects of such companies to active members and those who have been placed on the roll of honorary members as a reward for active service, is constitutional, and contributing members and life-members are not entitled to participate in such distribution. *Comm. ex rel. vs. Fire Company*, 393.

FOREIGN ATTACHMENT.

The court will, in their discretion, on the application of the garnishee in a foreign attachment, direct the plaintiff to issue a *scire facias* against the garnishee. *Finch et al. vs. Bullock*, 318.

GROUND RENT.

1. In an action for ground rent the principle that a tenant is estopped from denying his landlord's title has no application. *Hulseman vs. Griffiths*, 350.

2. To such claim a constructive eviction under a paramount title is an answer, although no actual ejectment was brought. *Id.*

INFANT.

The contracts of an infant at common law cannot be enforced except for necessities. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages. *Hughes vs. Gallane*, 618.

INSOLVENT.

1. An insolvent debtor will be discharged, although it is opposed because he was arrested on process on a judgment in an action for actual force, if the court by going behind the judgment ascertain that the cause of action was not founded on actual force. *In re Widmeyer*, 81.

2. If an insolvent petitioner omits to return a debt due to him from an honest conviction of its worthlessness, it will not defeat the petition. *Id.*

3. The State court has not authority to discharge an insolvent debtor arrested upon process issued out of the United States Circuit Court upon a judgment founded upon a fraudulent representation alleged to have been made by the petitioner. *In re Thomas*, 82.

INSURANCE.

1. Every insurance company of this Commonwealth is required to file with the insurance commissioner a certified copy of its charter, together with a certificate, stating the time of its organization, the location of its principal place of business, and the names and residences of its officers, as directed by the 8th section of the act of 4th April, 1873. *Comm. ex rel. Attorney-General vs. Mutual Beneficial Association*, 554.

2. Every insurance company is compelled to transmit to the commissioner a statement of its condition and business, as directed by the 12th section of that act, except those specially exempted by section 16 of same act, who must at all times answer such interrogatories as the commissioner may require to ascertain their character and condition. *Id.*

3. No company incorporated within this Commonwealth since the adoption in 1857 of the fourth amendment to the constitution, can claim immunity from filing

INSURANCE—(Continued.)

such certificate and making such statement, on the ground that said act violates the Constitution of the United States by impairing the obligation of contracts, although there may have been no provision in the charter reserving to the Legislature "the power to alter, revoke or annul it." *Id.*

JURISDICTION. INSOLVENT, 3. DIVORCE, 12. ADMIRALTY, 7. TREATY.

1. A Maryland justice of the peace has not jurisdiction in attachment against a resident of Pennsylvania, for a debt contracted in Pennsylvania, the debtor not being personally present in Maryland, nor having property there. *Neville vs. Morgan*, 522.

Query? Whether if the debtor had been personally present in Maryland, and served with a summons, a Maryland judicial tribunal might not have properly refused to entertain jurisdiction of a controversy in Pennsylvania between parties domiciled here, who were only temporarily in Maryland, and had no property there?

Query? Whether, if such tribunal entertained jurisdiction because of the mere casual and temporary presence of the parties, it would not, *ex comitate*, respect and enforce the Pennsylvania statute exempting wages of labor from attachment in the hands of the employer?

2. Duty of United States commissioner in regard to application for discharge of insolvent debtor under State insolvent law, considered. *Russell vs. Thomas*, 239.

JURY. See ALDERMEN AND JUSTICES. CRIMINAL LAW, 6.

1. A judge may, where the evidence is uncontradicted, tell the jury that it is their duty to convict. *Comm. vs. Magee*, 201.

2. The act of April 22, 1874, for the submission of cases to the court without a jury, discussed. *Colket vs. Ellis*, 375.

3. A verdict of a jury will not be set aside for the misconduct of a juror in conversing about the cause on trial with a witness before or during the trial, when no improper influence or bias is shown, unless such misconduct was caused by a party to the suit, or his agent, or by his representations, and proof of the bias must be clear and manifest. *Shomo vs. Zeigler*, 611.

LACHES. See EQUITY, 1.

LANDLORD AND TENANT. See BANKRUPTCY.

1. Evidence that defendant was enjoined from using demised premises by an *ex parte* injunction issued at the instance of plaintiff is admissible under plea of eviction in an action for rent. *Pfund vs. Herlinger*, 13.

2. The facts of this case held to constitute a lease and not a mere personal license, which would end upon death of plaintiff's decedent. *Kunkle vs. Rifle Club*, 52.

3. A boiler held to be "an alteration or improvement" which by the terms of the lease were not to be removed by the tenant. *Agnew vs. Whitney*, 77.

4. A parole license contrary to the written terms of the lease should be clearly proved. *Id.*

5. A *certiorari* is not a supersedeas to a writ of possession issued upon proceedings under the act of March 21, 1772. *Insurance Co. vs. DeCoursey*, 88.

6. When a deduction is made from the landlord's damages, under appropriation by the sovereign for the time the lease has to run, and awarded to the lessee, it in equity belongs to the lessor, as he is deprived of recourse to the land for his rent. *Fitzpatrick vs. Railroad*, 141.

7. Equity will not restrain a proceeding by landlord against tenant for possession upon grounds such as a change of title, which may be asserted by the tenant in the proceeding itself. *Vanarsdalen vs. Whitaker*, 153.

8. The right of an execution creditor or landlord upon a warrant issued before the commencement of the proceedings in bankruptcy is paramount to the assignee in bankruptcy, and will control the fund as against the general creditors. *Wilson vs. Childs*, 275.

9. In an action for ground rent the principle that a tenant is estopped from denying his landlord's title has no application. *Huleman vs. Griffiths*, 350.

10. A surrender and acceptance of premises stops rent within the meaning of a recognition on *certiorari*. *Wistar vs. Campbell*, 359.

11. By virtue of the provisions of the act of assembly of 20th February, 1867, the alienee of the landlord may institute proceedings under the landlord and tenant's act of December 14, 1863, to recover possession of the demised premises made

LANDLORD AND TENANT—(Continued.)

by the landlord (the original lessor). To do this, attornment in this State is not necessary. By the sale of the demised premises to the grantee, and assignment of the lease to him, the law *infers* the consent of the tenant, and the land with the lease, and all the rights of the landlord, pass to the grantee by operation of law, and the grantee is within the provisions of the act of 6th of March, 1872, as to all the rights and privileges of the original lessor under the lease. *Tilford vs. Fleming*, 14 P. F. S. 300, followed. *Mortimer vs. O'Regan*, 500.

LEASE. See **LANDLORD AND TENANT**. **EQUITY**, 27.

LICENSE. See **EQUITY**, 19.

1. A person who is not licensed to act as a broker may, nevertheless, maintain an action for a commission earned in the sale of arms. *Justice vs. Rowand*, 623.

2. The act of assembly imposes a penalty of five hundred dollars for acting as a broker without a license, but this fact will not prevent a party from recovering in a particular case, wherein he has acted as an agent for another, on a contract for a commission for services rendered, in effecting the sale of a lot of arms. *Id.*

MALICIOUS PROSECUTION.

1. Where the facts have been stated honestly, fairly, fully and without reservation to an alderman, and he advises defendant to proceed and make the arrest, the defendant cannot afterwards be successfully sued for malicious prosecution. *Thomas vs. Painter*, 409.

2. *Rosenstein vs. Feigel*, 6 Philada. Rep. 532, followed and approved. *Id.*

MANDAMUS.

1. A mandamus will not lie to compel the performance of an act by a person clothed with a discretion to determine the necessity of such act, and the time and circumstances which call for its performance. *Comm. ex rel. vs. Park*, 445.

2. A private claim to the right of interment in a cemetery lot will be enforced by mandamus. *Comm. ex rel. vs. Cemetery Association*, 385.

MARRIAGE. See **DIVORCE**, 7.

1. A marriage, although it may be void by the law of England, is not absolutely void here. *City vs. Williamson*, 176.

2. Defendant when he was married representing himself to be a Catholic, will not be allowed to contradict it now and ask to have the marriage declared void. *Id.*

MARRIED WOMEN. See **WILL**, 1, 2, 3, 4, 5. **EQUITY**, 9. **DIVORCE**, 11.

1. The title of a married woman is good where it appears to have been bought and paid for out of her own means and credit. *Schlessinger vs. Ellis*, 109.

2. Property in the possession of the wife will be presumed to be the property of her husband. The claimant who had falsely claimed to be the wife of defendant held to this rule. *City vs. Williamson*, 176.

3. A wife's choses in action do not vest in the husband at common law, unless he reduces them to possession. *McVaugh vs. McVaugh*, 457.

4. A husband confessed judgment to his wife and she issued a *f. fa.* against his personal estate, which was lodged in the sheriff's hands a few moments before a creditor's *f. fa.* Held, that she could not issue such execution. *In re Marvin*, 524.

5. Wife of defendant in an attachment against stock standing in her husband's name cannot be allowed to testify that the stock belongs to her. *Boyle vs. Haughey*, 98.

6. An injunction will be granted to restrain the sale of a wife's property for the debt of her husband where her title is clear and undoubted. *Allen vs. Benners et al.*, 10.

MECHANICS' LIEN.

1. A mechanics' lien cannot be stricken off by petition based on questions of fact not arising upon the record. *Frick & Snyder vs. Gladdings*, 79.

2. Where materials are furnished, not under a contract for the whole, for two buildings which are the proper subject of an unapportioned lien, the claims for the materials for the building first erected must be filed within six months from

MECHANICS' LIEN—(Continued.)

the time the last materials for it were furnished. The subsequent furnishing of materials for the other building will not extend the time for the filing of the lien for the materials furnished for the first building. *Hudnit vs. Roberts*, 535.

3. When a mechanics' lien which is defective has been filed, and the property against which it is entered is sold by the sheriff before the expiration of the six months allowed by law for filing the lien of a mechanic, the claim may be made upon the fund with the same effect that it could be made, if a lien sufficient in form and substance had been entered of record before the sale. *Schrader vs. Burr*, 620.

MORTGAGE. See SHERIFF'S SALE.

A mortgage given by a corporation on its leasehold interest, machinery and fixtures, and no objections made against its validity by the company, cannot be defeated by an assignee in bankruptcy of the company on his affidavit that it was given without due authority. *Lewis vs. Phila. Axle Works*, 334.

MUNICIPAL CLAIMS. See EVIDENCE, 13.**NUISANCE. See EQUITY, 32, 33.**

1. The power of the board of health does not extend to the removal of tenants from their houses, and closing up the latter, unless justified by the existence of a pestilential disease.—Such action will be restrained by injunction. *Eddy et al. vs. Board of Health*, 94.

2. A special injunction to restrain the erection of a proposed abattoir and slaughtering-house, will not be granted where the affidavits do not establish the fact that they will be a nuisance. *Sellers et al. vs. Railroad et al.*, 319.

3. A Chinese laundry in a basement so conducted as to injure the trade of a tradesman in the next story may be such a nuisance as equity will interfere to prevent damage from. *Warwick vs. Wah Lee & Co.*, 160.

4. The business of a gold or silver beater, set up in a quiet dwelling neighborhood and by its noise and concussion unreasonably interfering with the quiet enjoyment, and perhaps safety, of neighboring property, is a nuisance which equity will restrain. *Wallace vs. Auer*, 356.

5. The unauthorized occupation of a street by railway tracks is a nuisance *per se*, which equity will restrain upon information of the attorney-general, without a preliminary trial at law. *Attorney-General vs. Railroad*, 352.

NEW TRIAL.

1. The court not considering the verdict against the evidence or the weight of the evidence will not grant a new trial. *Comm. vs. Rogers*, 187.

2. Where the judge mistook the evidence in his charge a new trial will be granted. *Comm. vs. Taylor*, 184.

3. Evidence of alleged insanity of prisoner is ground for a new trial. *Comm. vs. Smith*, 189.

ORPHANS' COURT.

Registers' courts having been abolished and "all their powers and jurisdiction" having been transferred to the Orphans' Court by Article V., section 22, of the Constitution, it is the duty of the register when any "disputable or difficult matter" arises before him in the probate of a will, upon the request of either party, to transmit the proceedings to the Orphans' Court for adjudication, and this duty is enforceable by mandamus. The right to remove the proceedings in such case given by the 25th section of the act of 1832, is not taken away by the new Constitution, but the Orphans' Court is substituted in the place of the register's court. *Comm. ex rel. vs. Clark*, 419.

PARENT AND CHILD. DIVORCE, 10.

A father never having abandoned his child, nor legally committed its control to others, has the right to appoint a testamentary guardian. *Comm. ex rel. vs. Hearne et ux.*, 199.

PARTNERSHIP. See EQUITY, 3.

1. The agreement of partners to make real estate part of the common stock must be in writing, and ought to appear of record. *Harding vs. Devitt et al.*, 95.

2. The name of a firm of special partners—"Bullock's Sons"—the special part-

PARTNERSHIP—(Continued.)

ners being brothers of the general partners, does not make them liable as general partners, the sign required by the act of 1868 being properly exhibited. *Villus Bank vs. Bullock et al.*, 309.

3. After dissolution of a partnership and payment of its debts, if there is no special agreement, each partner should be paid ratably his advances. *Christman vs. Baurichter*, 115.

4. A partner cannot be indicted for forgery of an instrument in writing with intent to defraud the copartnership. *Comm. vs. Brown*, 184.

5. W., N. & R. formed a copartnership for the single purpose of erecting a furnace for the Emaus Iron Company. They borrowed for partnership purposes \$15,000 from the Miners' Trust Company Bank, for which they gave their joint judgment obligation, and also deposited with the bank stock of the Emaus Iron Company as collateral security. The partnership was dissolved before the work was completed, and a short time thereafter W. was declared a bankrupt. His assignee in bankruptcy sold his real estate, at which time notice was given of the above judgment. On petition presented by the purchaser for a rule to show cause why the real estate bound by the lien of said judgment, including that of N. and R., should not be sold in the proportion or in the succession, that the owners were liable to contribute to the payment of said judgment, otherwise on the payment of the judgment, that the Miners' Trust Company Bank might be compelled to assign the judgment and the collaterals for such uses as the court might direct.

Held: 1. That as between the original parties, until there was a final settlement of the partnership business, the court would not subrogate W. to the rights of the plaintiff in the judgment notwithstanding the agreement of N. and R. to pay the partnership debts, it being alleged that the partnership transactions were unsettled, that W. was a debtor to N. and R. in a large amount, and that the consideration for the promise of N. and R. to pay said partnership debts had failed. 2. That the purchase of the real estate, having been made with notice of the judgment, was made subject to its payment by the purchaser, and that he had no claim to subrogation or contribution. *Bank vs. Wren et al.*, 502.

PARTY-WALL.

1. When the foundation of a wall is partly on plaintiff's and partly on the adjoining land, although the wall after it rises is *all* on defendant's land, still it will be considered a party-wall and subject to the rules concerning party-walls. *Gordon vs. Milne*, 15.

2. Easements or servitudes which are apparent and continuous, and which are technically extinguished or put to sleep by unity of title, and are allowed to remain undisturbed, revive upon severance. *Hurlburt vs. Firth*, 135.

3. The act of May 20, 1857, applies to a division wall, as well as to a PARTY-WALL. *Id.*

4. A erected a wall on his own lot and partly on the adjoining lot, which he subsequently purchased; he afterwards sold the built-up lot, reserving the half of the party-wall nearest to the vacant lot, and also sold the vacant lot to another person. *Held*, that A did not thereby dispose of his interest reserved in the wall, as it was a party-wall. If the wall had been wholly laid upon the land of the plaintiff, it could not be considered a party-wall. *Beaver vs. Nutter*, 345.

PASSENGER RAILWAYS. See CITY OF PHILADELPHIA, 1, 2, 3, 4. ROADS AND STREETS, 3, 4. PUBLIC BUILDINGS COMMISSION.

1. A railway cannot occupy a street with its track, even temporarily, unless such right is clearly conferred by its charter. *Attorney-General vs. Railroad*, 352.

2. The councils of a city cannot confer such right; but only the people of the whole State by their Legislature. *Id.*

3. The unauthorized occupation of a street by railway tracks is a nuisance *per se*, which equity will restrain, upon information of the attorney-general, without a preliminary trial at law. *Id.*

4. The act incorporating the defendants authorizing them to extend their road at any time, repeals the 19th section of the act of 1849, as far as it applies to them. *Railway vs. Railway*, 75.

PATENT.

1. An action for an infringement of a patent survives against an administrator. *Smith vs. Baker's Administrators*, 221.

2. A mistake in the Christian name of a grantee of a patent will not render the

PATENT—(Continued.)

patent invalid, if his identity is otherwise established. *Extinguisher Co. vs. Extinguisher Co.*, 227.

3. The grant of letters of administration by a competent court will be presumed to be regular. Also the reissue of the patent to the administrator of the patentee. *Id.*

4. The patentee having assigned the patent before his death, his administrator is trustee for the assignee, and the heir is not a necessary party to an action for infringement. *Id.*

5. The record of a rejected application to the patent office, the specifications, models, etc., are admissible in evidence on a question of novelty of invention. *Id.*

6. Graham having invented, and in 1853 perfected, a practical mode of extinguishing fires by the combined agency of carbonic acid gas and water, the invention of Carlier and Vignon is invalid from want of novelty. *Id.*

7. The mechanical combination of appliances for generating carbonic acid gas claimed by Carlier and Vignon, are not novel, having been invented by Nichols in 1854, and applied to the production of soda water. *Id.*

8. Under cover of securing his own invention, a patentee cannot expand his claim so as to embrace the invention of another; the consequence of such an attempt is to imperil his title to the product of his own mechanical skill. *Screen Co. vs. Boughton*, 251.

9. The patent of the Locomotive Engine Safety Truck Company is not invalid for want of novelty in the invention, for, when in combination with a locomotive engine, it is substantially a different truck from any other in use. This combination is a patentable invention. *Truck Co. vs. Railroad*, 252.

10. The mere forbearance to apply for a patent during the progress of experiments, and until the party had perfected his invention and tested its value by actual practice, affords no just ground for presuming an abandonment. *Id.*

11. Burrows' patent for a furnace to be used in the manufacture of white oxide of zinc, not upheld, as he was not the first inventor. *Burrows vs. Zinc Co.*, 262.

12. On bill filed for an account, and to restrain defendants from the use of patents under a license alleged to have been fraudulently granted, an injunction order was made by virtue of the 7th section of the act to further the administration of justice, approved June 1, 1872, (17 Stat. 197,) enjoining the defendants from making or vending any fruit jars containing the improvements secured by said letters patent, until the decree of the court upon the motion for an injunction.

Application made to the court to modify the injunction order so as to allow defendants to complete certain contracts for jars, upon the tender of security to the complainant for all damages, and on the affidavit of one of the defendants, that they had purchased the right to manufacture and sell under the license, in good faith, and without notice of the alleged fraud.

The application was refused; the court holding—

That all the rights of defendants in the patents were acquired under an agreement, which, in effect, was an attempt to apportion or subdivide the right to use the patents, between a licensee and his grantee; and that whatever may be the law, in regard to the assignment of the entirety of a license, by a licensee, the right to apportion the same among different purchasers did not exist, and such apportionment was void. *Jar Co. vs. Whitney*, 268.

13. That as it appeared by the bill, and by the admissions of one of the defendants in his affidavit, that defendants had received notice of pending suit, setting up fraud in their grantors in claiming said patent, their appeal to the equitable powers of the court to allow them to fulfil certain contracts, not listened to, until they should show that said contracts were entered into before they received the said notice. *Id.*

14. That where the owner of a patent relies upon the use of the monopoly of the invention, and not on the sale of licenses, for his gains and profits, he is not compelled to accept the security which the bond of an infringer may give, in lieu of the protection afforded by the injunction of the court. *Id.*

15. That in the absence of fraud, in obtaining the control of the patents, the defendants may be protected by security from the complainant against all losses and damages sustained from the interruption of their business, if the court should ultimately hold, that the injunction order was improvidently issued. *Id.*

PENALTIES. See CRIMINAL LAW, 6.

1. A proceeding, however, to recover a fine for the violation of a borough or city ordinance is not a summary proceeding; it is of a civil nature, and is to be con-

PENALTIES—(Continued.)

ducted according to rules applicable to civil suits. Where the penalty goes to the city or borough, the corporate name of such city or borough should be used as plaintiff; where it goes to the person suing, the corporate name of the city or borough for the use of the informer, naming him, must appear as plaintiff; but where the action is *qui tam*, a part of the penalty going to the informer, and a part to the city or borough, the informer must be named as plaintiff, suing for himself as well as for the city or borough. *Comm. vs. Davenport*, 478.

2. Where, however, an offence is created by statute, and, on conviction, a penalty is imposed, to be recovered by any person suing for the same, *as debts of like amount are by law recovered*, the proceedings should be by summons in debt, in the name of the Commonwealth for the use of the party suing, followed by judgment for the penalty, if the evidence establishes the guilt of the accused. *Id.*

PLEADING. See PRACTICE. DIVORCE. LANDLORD AND TENANT.

PRACTICE. See ACTION. ATTACHMENT. AFFIDAVIT OF DEFENCE. ALDERMEN AND JUSTICES. TURNPIKES. CONSTITUTIONAL LAW, 7.

1. Where a statement of the record of an assignment refers to a book which is not in the recorder's office, the mistake is fatal to the action. *Crosdile vs. Brown*, 12.

2. An inquisition to compel a turnpike company to open its gates, because it is not in such good and perfect order as required by the act of 1803, must be in strict conformity with the requirements of the act. *In re Turnpike Company*, 59.

3. A certiorari is not a supersedeas to a writ of possession issued upon proceedings under the act of March 21, 1772. *Ins. Company vs. DeCoursey*, 88.

4. A return of *nulla bona* is not sufficient to found a bill under the act of 1863, making the officers of certain corporations liable in equity for their debts. The return must set out that no real or personal property of the corporation was exhibited to the officer, sufficient to satisfy the debt, as required by the act. *Bacon vs. Morris*, 93.

5. When the plaintiff sues as a public officer, the character of the work done and materials furnished should appear affirmatively on the record. *Cloud vs. Tullow*, 307.

6. Judgment cannot be taken for want of a sufficient affidavit of defence where the plaintiff was dead at the time of the issuing of the writ and the writ was not amended till after judgment day. *Lynch vs. Kerns*, 335.

7. A *fi. fa.* was indorsed interest "from December 30, 1873," the facts being that 12 per cent. interest had been paid for that year: *Held*, that a rule would be granted to correct the said indorsement to "interest from December 30, 1874." *Crosdile vs. Cadwallader*, 343.

The application was made by the terre tenant, and the court held that he was entitled to take credit for the excess of legal interest. *Id.*

8. A writ may be made returnable in Philadelphia county to the first or the third Monday in September. *Association vs. Gardiner*, 361.

9. Judgment for want of an appearance can only be taken after fourteen days have expired after service. *Id.*

10. In a *sci. fa. sur mortgage* no narr need be filed in order to take judgment for want of an appearance. *Id.*

11. In taking a judgment for want of an appearance on a return of two *nihils* on a *sci. fa. sur mortgage*, the fourteen days must be calculated from the return day of the writ, and not from the *teste* of the writ. *Furness vs. Subers*, 411.

12. A summons returned *nihil habet*, and an alias served, constitute but one case, and a *fi. fa.* issued under the term and number of the original is not improper. *Shaw vs. Kenath*, 444.

13. A *fi. fa.* and attachment execution may both issue and be pursued at the same time, and plaintiff will not be compelled to elect upon which he will proceed unless property is seized under either sufficient to pay the judgment. *Id.*

14. Judgment entered against administrators in a suit upon a contract of their decedent for want of an affidavit of defence, is irregular and void, and will be stricken off on motion. *Wright's Executors vs. Cheyney's Administrators*, 469.

15. A rule to show cause must not be predicated upon a mere abstraction, nor upon any colorable pretext invented for the purpose of *pumping* the court, but upon something actual and pertinent; which, when determined judicially, shall control the subject-matter involved. *Washburn vs. Baldwin*, 472.

16. A case stated, whether the action has been instituted by amicable agree-

PRACTICE—(Continued.)

ment or by process issued, must contain a full and certain statement of all the facts belonging to the case; so that when a judgment is entered thereon, it shall be capable of enforcement to the same extent as though reached by the verdict of a jury. *Id.*

17. A rule to show cause, and a case stated, must be *real*, never *supposititious*. *Id.*

18. Any attempt to obtain the opinion of the court upon a question of law, through the instrumentality of a mere supposititious case, is reprehensible, and the parties offending may be punished for a contempt of court. *Id.*

19. A defendant is entitled to the benefit of the exemption law in a proceeding commenced by attachment under the act of 17th March, 1869, if the original demand be founded on contract. *Id.*

20. A husband confessed judgment to his wife, and she issued a *fi. fa.* against his personal estate, which was lodged in the sheriff's hands a few moments before a creditor's *fi. fu.* Held, that she could not issue such execution. *In re Murvin*, 524.

21. A joint action against three. Award against two and in favor of the third. Appeal by the two. No appeal as to the third. Subsequent proceedings against the two. On the trial the signature of third defendant admitted to be forged. Held, that the record might be treated as amended and a verdict against the two sustained. *School District vs. Bilborough*, 542.

22. Where a claimant in a sheriff's interpleader files a narr within fourteen days, as required by the rule of court, but neglects to give the bond, the court, on motion, will order the sheriff to sell and pay the proceeds of the sale into court to abide the determination of the issue. *Dillon vs. Conover*, 450.

23. On a judgment obtained in the Common Pleas, either by adversary action or by confession, which, without costs, shall not amount to more than one hundred dollars (the plaintiff not having previously filed the required affidavit), costs of execution will be allowed. *Davenport vs. Williams*, 575.

PUBLIC BUILDINGS COMMISSION.

1. The building commissioners have no right to obstruct the Market street railroad in their route along Market street. *Railway vs. Perkins*, 20.

2. The railroad company has no right to alter its course, nor can the commissioners confer such right upon them. *Id.*

QUO WARRANTO. See BOROUGH, 3, 4.

1. An injunction will not lie to restrain the exercise of a public office. *Quo warranto* is the remedy. *Campbell vs. Tuggart et al.*, 443.

2. Where the attorney-general is the relator, a writ of *quo warranto* will issue in the first instance, and a preliminary rule to show cause should not be required. *Comm. ex rel. vs. Bunk*, 156.

3. Private citizens having no particular or special interest to be affected, have not the right to ask for a *quo warranto* to oust a member of councils. *Comm. ex rel. vs. Horne*, 164.

4. A citizen who claims a seat in councils in place of one who has removed from the ward, has sufficient interest to entitle him to a writ of *quo warranto* to determine the question of forfeiture. *Comm. ex rel. vs. Bumm*, 162.

RAILROAD. See CONSTITUTIONAL LAW, 9.

1. When a railroad takes private property for public use under the act of February, 1849, and its supplement, they are bound to follow the provisions of the law strictly. Any departure will render them trespassers. *Railroad vs. Lawrence et al.*, 604.

2. After entry and payment of damages or securing the same, the right of way over the land vests in the company. After filing of the bond, the owner can recover damages only. *Id.*

3. An owner within the purview of the act is one who has some interest in the land at the time the injury was done. One who has acquired an interest therein, either in fee or as tenant for years, or as lessee after the injury has been committed, is entitled to no damages. *Id.*

4. If there be errors in the view or any part of the proceedings, the remedy is to file exceptions in court, and if not sustained, to certiorari the proceedings. When, however, an appeal is taken within the thirty days allowed by law to the report of the viewers, all irregularities are waived, and all the requirements of the statute are presumed to have been done. *Id.*

RAILROAD—(Continued.)

5. When a party having knowledge of the possession and use of the land by a railroad company, afterwards takes a lease of the coal beneath, he cannot require the company to remove the track, and his only remedy, if he has any, must be under the statute for damages. *Id.*

REGISTER OF WILLS. See ORPHANS' COURT.

REPLEVIN.

Where in replevin for goods distrained for rent, the pleas are *non demiserunt* and *riens en arriere*, and they are sought to be sustained by evidence of fraud in obtaining a lease, a finding of facts by the arbitrator that the relation of landlord and tenant existed between the plaintiff and defendant by virtue of a lease of a certain date in writing; that there is a sum certain due the defendants for rent under the lease; that no fraud is proved, with a statement of distress, replevin and pleadings showing the issue, is sufficient under the section requiring a finding of facts in the nature of a special verdict. *Van Syckle vs. Stewart*, 547.

ROADS AND STREETS. See BOARD OF SURVEYS.

1. The act of 1855 requires that all new buildings fronting on a court of less width than twenty feet shall recede so that the court shall be of that width; this act is constitutional, and the owner is entitled to compensation. *In re Perry's Court*, 27.

2. A building erected upon a corner lot FRONTS UPON both streets or alleys on which it bounds, within the meaning of the act of April 21, 1855, and the streets or alleys must be twenty feet wide. *City vs. Michener*, 30.

3. An injunction will not be granted to restrain the city from changing the grade of a street, upon the complaint of a passenger railway company, who had purchased the right of way over the street, formerly a turnpike, where ample remedy is given the company for the recovery of whatever damages may result to them by statutory proceedings. *Railway vs. City*, 37.

4. The act of 1846, as to injunctions against public buildings, and the *Market Street Railway vs. Building Commissioners*, discussed. *Id.*

5. There can be but one jury of damages under the act of 13th March, 1873, relating to Delaware avenue. *Fitzpatrick vs. Railroad*, 107.

6. The act of June 21, 1873, authorizes the opening of Girard avenue and Twenty-second street through Girard College grounds, and is constitutional. *In re Girard College Grounds*, 145.

LUDLOW, J., dissents.

7. The act of May 6, 1872, only gives the right to open streets through Monument Cemetery. It does not give the right to go beyond. *Nuglee vs. City et al.*, 121.

8. The councils of the city by the act of April 14, 1868, are authorized to widen and straighten any street laid upon the public plans of the city. This does not give them the right to extend the street or alter its course. *In re Widening of Thirty-fourth Street*, 197.

9. An ordinance for the widening of Vine street contained a proviso that the owners of the property should give security that no damages should be entered against the city exceeding \$1,000. As this proviso was not complied with, the report was set aside. *In re Oregon Street*, 382.

10. As the jury appointed to report on the opening and straightening of Girard avenue could not agree on a report, the court have the power to appoint another jury. *In the matter of Girard Avenue*, 341.

11. A road jury can properly consider all the disadvantages as well as advantages to the public in the opening of streets, and it was not improper for them, in this case, to consider the nature, character and purposes of "The Girard College for Orphans," whose grounds would be taken, and whether its usefulness would be impaired, and the benefits it confers on the public restricted. *In the matter of Girard Avenue*, 312.

12. All the houses in a certain row were, less than twenty years ago, built five feet back from the building line, but there was no express agreement among the property-owners to this effect. *Held*, that a special injunction would not be granted to prevent defendant from erecting a bay window on the five feet recess. *Neill vs. Gallagher*, 172.

13. The mere setting back of a building from the line of a street by the owner for his own convenience or comfort, is not of itself a dedication of the land thrown out, and he may reclaim it at will. *Id.*

ROADS AND STREETS—(Continued.)

14. A road jury in assessing damages for opening a street must award them "as damages for the opening of the street." *In re opening of Fifteenth, Sixteenth, and Norris Streets*, 214.

SALARIES.

The provisions of the 4th section of the 14th article of the constitution, which declare that "the compensation of county officers shall be regulated by law," and "that in counties containing over 150,000 inhabitants all county officers shall be paid by salary," are prospective in their operation, dependent upon legislative action, to carry them into effect, and do not repeal existing laws until the new laws are passed. *Comm. ex rel. vs. Collis*, 430.

SCHOOL LAWS.

1. While school directors elected prior to the beginning of a current school year cannot exercise any control over the schools, nor any of the powers pertaining to their office, until the full term of their predecessors has expired, yet, after that has taken place, their official functions attach, and they are entitled to meet with the continuing members of the board, and to participate both in the temporary and permanent organization. *Bouton vs. Royce*, 559.

2. The first business of a school board, composed of continuing and newly elected members, is to organize by choosing a president, secretary, and treasurer. This is best accomplished, ordinarily, by effecting a temporary organization; whereupon the returns of the election are read, or the certificates of the directors elect are presented, and thus, all the members alike participate in the permanent organization. If a permanent organization cannot be accomplished, however, because no one of the members can obtain a majority of votes for president, it is such neglect of duty as will justify the proper court, upon application made according to law, to declare their seats vacant, and appoint others in their stead. *Id.*

3. The continuing members of a school board are not judges of "the legality of any election of directors." The statute authorizes and requires the Court of Quarter Sessions, whenever not less than six qualified citizens of a district contest an election, "forthwith to examine into it, and to confirm or set it aside, as shall seem just and proper; and if set aside to order a new election," etc. *Id.*

4. The law authorizing "less than a majority" of directors to fill vacancies in a school board, only applies where the number has been thus reduced from the causes mentioned in either the seventh or the eighth section of the act of May 8, 1854, P. L. 618, *Purd.* 239, 240, pl. 22, 23, or from both combined. *Id.*

5. The provision in the school law authorizing the directors of adjoining districts to establish joint schools, applies where the number of pupils in each is not large enough to warrant the expense of establishing and maintaining separate schools; but, by uniting the two, a number is reached which meets the contemplation of the statute. *Comm. ex rel. vs. Williamson et al.*, 490.

6. While school directors are necessarily clothed with large discretion in the management of the public schools, which will not be repressed on the part of the courts by anything less than a generous and liberal supervision, still it is a mistake to assume that this discretion is unlimited. Judicial authority may be invoked as successfully to restrain the illegal acts of school directors, as it may be to restrain official wrong-doing from any other quarter, or by any other class of men; it may be invoked likewise to compel school directors to discharge their duties under the law. *Id.*

7. School directors have neither authority nor discretion to send pupils between the ages of six and twenty-one years, be they white or black, out of their proper district for instruction, except when by reason "of great distance from, or difficulty of access to, the proper school-house" of the district, such pupils can be more "conveniently accommodated in the schools of an adjoining district." *Id.*

8. Where the number of colored pupils in any district is less than twenty, there is no provision in the law which excludes them from the schools where white children are taught; and if the directors refuse to admit them thereto, *mandamus* will avail to correct the wrong. *Id.*

9. A board of school directors can appoint to fill a vacancy until the next annual election. *Comm. ex rel. vs. Thomas*, 600.

SEAMEN. See ADMIRALTY.

SERVICE OF PROCESS. See **DIVORCE**, 12. **CORPORATION**, 11. **PRACTICE**, 11.
Return of "served by serving a copy of original summons on defendant," is not sufficient. *City vs. Cuthart*, 103.

SHERIFF. See **PRACTICE**, 4, 22.

SHERIFF'S SALE.

1. A mortgage was made on a large lot of ground, which lot was afterwards subdivided and improved, and sold by the sheriff on proceedings on the mortgage. *Held*, that the proceeds of each lot should be applied to the payment of the mortgage in equal proportions, although some of the lots brought a larger price than the others. *Leech vs. Bonsall*, 384.

2. A sale by the sheriff under proceedings in partition discharges the lien of a mortgage: The act of March 21, 1867, construed. *Wright vs. Vickers*, 381.

STATUTE.

Where a statute repeals absolutely a prior law, and substitutes other provisions on the same subject, even though the latter seem designed to subserve but a temporary purpose, the prior law does not revive when the repealing statute is spent, unless the intention of the Legislature to that effect is expressed. *Bouton vs. Royce*, 559.

STATUTE OF FRAUDS. See **BILLS AND NOTES**, 3.

A parol agreement to purchase real estate is of no effect. A part payment without possession, and which was afterwards appropriated to another indebtedness, will not take it out of the statute of frauds. *Newkumet vs. Kraft et al.*, 127.

STATUTE OF LIMITATIONS. See **CRIMINAL LAW**, 1.

1. The statute of limitations never extinguishes a debt; it only forms a bar to the remedy to recover it by action. *Morris et al. vs. Hannick*, 571.

2. The act of February 24, 1806, authorizing judgments to be entered by the prothonotary on notes and other instruments, with confession of judgment attached, gives an additional remedy for collection to which the statute of limitations does not apply. *Id.*

3. Where a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the form of a note, with confession of judgment attached, it may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it. *Id.*

STOCKS.

Until actual transfer, the title of the purchaser of stock is merely equitable, and persons dealing with him, take the risk that the equitable title is such that he can compel a transfer of the legal title. *Wood et al. vs. Mailland et al.*, 84.

TAXATION.

1. In a proceeding by bill in equity to restrain the collection of school taxes, the court will not inquire into the validity of the appointment of the collector, he having given bond with sureties approved as required by law. *Cout and Iron Co. vs. Curran et al.*, 543.

2. The act of May 8, 1854, did not establish a fixed rate of taxation for school purposes. It merely provided a standard, by which the MAXIMUM rate could be ascertained at the time the tax is levied; to wit, the amount of both State and county taxes, authorized by law. *Id.*

3. The act of February 23, 1866, exempting real estate from the three mill tax for State purposes, operated as a reduction of a like amount on that species of property for school purposes. *Id.*

4. A levy of thirteen mills on real estate is three mills in excess of what the law allows. The collection of such excess may be restrained by injunction. *Id.*

5. A farmer who sells the product of his own farm, and occasionally that of his neighbor, cannot be rated as a dealer in goods, commodities, within the meaning of the mercantile tax law. *Barton et al. vs. Morris et al.*, 360.

6. A railroad company in embarrassed circumstances sold a large amount of stock below par, and afterwards paid a dividend on its whole capital. There being no proof that this was profits: *Held*, that the company was not liable to the tax on profits for this amount. *Comm. vs. Railroad Company*, 465.

TAXATION—(Continued.)

7. An act of assembly authorizing taxation for the payment of bounties previously paid is constitutional. *Fetty vs. Uhler et al.*, 514.
8. The power of the Legislature to tax for public good and for public purposes extends even retrospectively to all matters not penal, not in violation of contracts, and not forbidden by the constitution. *Id.*
9. Shares of national bank stock are personal property. *Strong et al. vs. O'Donnell*, 575.
10. Those belonging to non-residents are separated by the acts of Congress from the persons of their owners for purposes of taxation, and are to be taxed at the place where the bank is located. *Id.*
11. The States may direct the manner and place of taxing the shares of resident owners, and the Legislature of Pennsylvania not having separated such shares from the person of their owner, their *situs*, like that of other personal property, is at the domicile of their owner, and they are to be taxed in the town or city where he resides, not in that where the bank is located. *Id.*
12. To avoid multiplicity of suits, the court has jurisdiction to enjoin against the collection of an illegal and unauthorized tax. *Id.*

TENANCY IN COMMON.

Where the possession of the plaintiff, who was one of the tenants in common, is disputed by the others, an issue should be framed and the facts found by the jury. *Harding vs. Devitt et al.*, 95.

THEATRE.

1. The neglect of the proprietor of a theatre to mark a seat "taken," can give a stranger no right to a seat which had already been purchased by a third party. *Comm. vs. Powell*, 180.
2. As there are two acts of assembly requiring licenses to theatres, an indictment against the proprietor of a theatre should allege under which act the charge is made. *Comm. vs. Fox*, 204.

TRADE-MARK.

Plaintiff's trade-mark was "The Rising Sun" stove-polish with vignette of the sun.

Held, that defendants would not be restrained from using the words "Rising Moon," with vignette of the moon. *Morse vs. Worrell*, 168.

TRESPASS. See ACTION.

1. Cutting timber on the land of another, without color of title, is destructive to the freehold, and may be denominated *destructive trespass*. *Echert et al. vs. Fears et al.*, 514.
2. Equity will enjoin against the commission of such acts, when the party is insolvent, and where it is necessary to prevent a multiplicity of suits. *Id.*

TRESPASS ON THE CASE. See EASEMENT.

TRUST.

1. A trust for the separate use of a woman cannot be created, unless she is covert, or in contemplation of marriage. *Pickering et al. vs. Coates et al.*, 65.
2. Where a young woman makes a deed of trust and one year afterwards marries, held in this case to be in contemplation of marriage. *Ash vs. Boren*, 96.
3. A limitation by which the course of descent is broken, makes the trust an active special trust, and should be kept alive to support the remainders. *Id.*
4. What facts are necessary to constitute a purchaser at a sheriff's sale a trustee for another, who alleges that he refrained from bidding on account of an agreement with him, discussed. *Burkhardt vs. Schmidt*, 118.
5. The trustees of the *aggregate fund*, being the legal holders of the notes, payment whereof was intended to be secured by the 381 *trust*, are entitled to the balance in hands of the accountant. *In re 381 Trust*, 297.
6. The claims of Morris & Nicholson's representative are settled in *Halley's Appeal*, adversely to the claimant, because Morris & Nicholson never paid Greenleaf for the shares, and cannot acquire an equity upon presumption of payment from lapse of time. If such payment could be shown to have been made by Morris & Nicholson, it would be otherwise. *Id.*

TRUST—(Continued.)

7. Trustees guilty of a breach of trust, who have lost the trust assets, and who have assigned property of their own to another as security, or in trust for the benefit of the *cestuis que trust*, cannot have a decree for an account against such third person without joining the *cestuis que trust* or restoring the trust assets. *Potter et al. vs. Hoppin et al.*, 396.

8. The assignee of such property, under such circumstances, becomes a trustee *de son tort*, and is accountable directly to the *cestuis que trust*. *Id.*

TURNPIKES.

1. In proceedings under the act of 1840 against a turnpike company must show: That the complaint was made before the aldermen of the neighborhood. *Simons vs. Turnpike*, 101.

2. They should be sworn to inquire whether the road, or any part of it, is in good travelling order and repair, not whether it is in perfect order. *Id.*

3. The return of the constable should set forth the names of the citizens summoned. *Id.*

4. An inquisition to compel a turnpike company to open its gates, because it is not in such "good and perfect order," as required by the act of 1803, must be in strict conformity with the requirements of the act. *In re Turnpike Co.*, 59.

VENDOR AND VENDEE. See EQUITY, 11, 12. LANDLORD AND TENANT, 11. PARTNERSHIP, 5.

1. A distributee of purchase-money cannot dispute the purchaser's title. *Potter et al. vs. Hoppin et al.*, 396.

2. The purchaser of a property sold at auction, cannot recover the deposit money when a good title is offered him. *Schlessinger vs. Ellis et al.*, 109.

VERDICT.

To permit, even after three trials, a verdict to stand without evidence, is to plunder a citizen under the form of levy. *Lodge vs. Railroad*, 153.

WAGES.

1. Mechanics, miners, laborers, and others claiming under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property; in default of this notice, no lien. Construction of said act and its requirements. *Bank vs. Childs*, 452.

2. The act of April 9, 1872, "for the better protection of the wages of mechanics, miners, laborers and others," does not give a lien for wages earned after the particular property has been seized by the sheriff on an execution. Property levied is in the custody of the law, and when sold the proceeds are preserved against lien creditors subsequent to the levy. *Schrader vs. Burr*, 620.

WILL.

1. An instrument in writing executed by a married woman as a will, in the presence of but two persons, one of whom is a devisee, of an estate in remainder under the will, cannot be established as a valid will under the act of 1848. *Camp et al. vs. Stark*, 528.

2. The proviso to that act which requires that the will of a married woman shall be executed in the presence of two witnesses, is to be construed as a condition, without compliance with which the will is invalid. *Id.*

3. It is not necessary to the validity of the will of a married woman that she should in all cases make the formal declaration that it is her last will. *Id.*

4. An issue directed by the register or register's court to the Common Pleas can only be for the trial of disputed facts. Whether an instrument upon its face is a testamentary disposition is a question of law, which must be determined by the register or register's court, or by an appeal to the Supreme Court. *Id.*

5. Testator devised to his wife in trust for herself and children, and, after a certain time, "if the executor thinks it will be more productive," the property to be sold, and the money divided. The parties in interest, having elected by deed to take the land in lieu of the proceeds of the sale thereof—*Held*: That a deed from them, without joining the executor, passed a good title to the defendant. *Tweedell vs. Land Co.*, 63.

6. The general rule is, that in order to establish the validity of a will the subscribing witnesses must be called, if living and within the jurisdiction of the court, but if, after strict, diligent and honest inquiry, satisfactory to the court

WILL—(Continued.)

under the circumstances of the case, the subscribing witnesses cannot be found, other evidence will be admitted to prove the signature of the testatrix. *Givin vs. Green*, 99.

7. Will construed to pass a fee and not a life-estate. *Martin vs. McDevitt*, 19.

WITNESS. See EVIDENCE, 4.

1. Witnesses attending without subpoena, and not called to testify, are entitled to their costs, where a subpoena had been taken out but they waived its service, and where there was no allegation that their testimony was not needed. *Lagrosse vs. Curran*, 140.

2. A devisee is a party to the will, and not a witness, within the meaning of the statute. The witnesses must be competent at the time of execution of the will to authenticate it by their testimony. *Camp et ux. vs. Stark*, 528.

3. The act of 1869 allowing parties to be witnesses is not retrospective in its character, to the extent of making a party to a will executed in 1858, a witness within the meaning of the proviso of the seventh section of the married woman's act. *Id.*

